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Trusts and Their Treatment in the Civil Law

IN THE CIVIL LAW THERE IS NO LEGAL INSTITUTION that directly corresponds to the common law trust.[1] Thus, not only is it impossible to create trusts under the civil law, but initially it also appears uncertain how the civil law should treat assets which are found within its domain and belong to an English or an American trust. It is the purpose of the present article to answer the latter question. Thus, suppose the following cases: Property belonging to a New York trust comes to Switzerland; can the creditors of the trustee seize it? Movable and immovable property situated in Switzerland is to be acquired for this trust; how is this to be accomplished?

The following first section sets forth those aspects of trusts which are regarded as essential for legal comparison and on which the three subsequent sections are based.

I

In medieval England,[1a] trusts were transfers of property, by which the grantee, the trustee, undertook to surrender the profits of the property, and usually also its management, to the grantor, or to a third party, the beneficiary, and upon their request also at any time to transfer the property back. The law did not enforce such trusts. This in consequence depended entirely upon the good faith of the trustee and his heirs. With the wider use of trusts appeared a need for more adequate protection of the beneficiary. As the law was not prepared to provide such protection, in this as in other branches of law, the royal chancellor intervened. Formally, the law was in no wise altered, but the chancellor, irrespective of or even contrary to the legal situation as it might exist at law, constrained the trustee to perform the trust. In so doing, the chancellor likewise acted in accordance with principles, which in their totality were termed equity and were applied by special tribunals, the equitable courts; for their enforcement, the state provided means of execution. Thus, equity took the place of the mere faith of the trustee, as a legal system competing with the common law, which partly abrogated and partly supplemented the law.

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[1] The Liechtenstein trust is merely an apparent exception. *Cf.*, Part III, No. 4, *infra*.

[1a] At that time, and still in the Statute of Uses (1536) the terms "use" and "trust" were used interchangeably.

The individual stages of the advancing development of trusts through equity during the centuries may here be passed over; it is sufficient to consider the result today reached in America and England, and indeed primarily as concerns private trusts.

1. In the creation of a trust, its purpose must be prescribed, who is to be the beneficiary of the trust property and on what terms. Thereafter, only under specific conditions can the purpose of the trust be altered or its duration prematurely terminated: upon unanimous demand of all beneficiaries who furthermore must be of age, by the court[1b]; as well as by the settlor or a third party, in case and insofar as authorization therefor has been included in the trust instrument. Such authorization to alter the trust, however, must not go so far as to control the trustee completely; in this event, the relationship would be regarded no longer as a trust but as an agency.[2] Apart from the exceptions stated, neither settlor, nor beneficiaries, nor trustee, nor all of these together, can terminate or alter the trust.[3] The rules against perpetuities prescribe a limitation of time for trusts; beyond these there are scarcely any legal limitations on its permissible purpose.

In the trust, administration and enjoyment are separated; trustee and beneficiaries should not be identical.[3a] As soon as the trustee has no more active duties to perform, it becomes a passive or dry trust, which automatically terminates, the legal title passing to the beneficiary.[4]

At law the trustee remains owner, and this confers upon him the legal power to dispose of the trust property. On the other hand, equity so restricts the legal ownership of the trustee that he can in no wise exercise it in his own interest but can utilize it only as is necessary for the expedient administration of the trust. Not only must the trustee himself comply with the trust. His creditors are not allowed to seize trust property; neither is it inheritable nor can the trusteeship be alienated[4a]; and third persons, provided they are not bona fide purchasers for value, can be forced to restore illegally alienated trust property. In addition, the trust assets are made autonomous in every respect, as particularly appears in

[1b] Most American states require in addition the settlor's consent.

[2] Scott, "Trusts and the Statute of Wills," 43 Harvard Law Review (1930) 529.

[3] Scott, "Fifty Years of Trusts," 50 Harvard Law Review (1936) 72.

[3a] If there are several trustees of a trust these may also be the beneficiaries of the trust. There is sufficient diversity of personnel because as trustees they are joint tenants and as beneficiaries they are tenants in common.

[4] Bellows v. Page, 188 Atl. 12, 88 N.H. 283 (1936).

[4a] If there is no surviving trustee, the trust estate was inheritable according to the old common law rule. In most American states and in England, however, this has been changed by statute. Where the title to the trust property still passes to the heir or to the personal representative of a deceased sole trustee, the court will, upon application, appoint a new trustee to carry on the trust and relieve the personal representative.

the following aspects: if the settlor does not name a trustee or the one designated refuses such office, the trust nevertheless is created and a trustee will be appointed by the court; this procedure is repeated in case of later vacancies in the trusteeship. If liabilities are incurred in the administration of a trust, originally the trustee was personally liable; he was, however, entitled to compensation from the trust property. Today, in most American states it is permissible for the trustee to exclude individual liability and to obligate the trust as such.[5] According to the Uniform Trusts Act,[6] liability of the trust alone is assumed as soon as the trustee appears in such capacity. To prosecute his claim in equity against the trust, the creditor must sue the trustee in his representative capacity. If meanwhile a change occurs in the trusteeship, then the suit is against the new trustee.[7] The only requirement is that the trustee acted in lawful exercise of his authority. As respects transfer of trust assets by the settlor to the trustee, the customary forms apply. But according to English and, so far as appears, also according to American law, these are no longer necessary as between successive trustees. A trustee ipso facto loses all rights which pertain to him in such capacity at the moment he steps out of the trusteeship, and these pass automatically to his successor.[8] A trustee who does not properly perform his function is replaced by the court. If the trustee unlawfully alienates trust property, he can demand it back, except of course from a bona fide purchaser for value.[9] The beneficiary has this same power, but only when the trustee proves negligent, or is prevented from acting, or there is no trustee for the time being. In such cases, the suit of the beneficiary seeks restitution to the trustee;[10] the beneficiary in such case acts in the place of the trustee on behalf of the trust. The maintenance of the trust property is assured by the principle of subrogation; everything which is acquired in place of trust assets, and also all profits made in connection therewith, pertain to the trust.

It follows logically from the purposive dedication and autonomy of the trust assets, that the relations between the persons participating in the trust today no longer are of a contractual nature, but rather that the trust is created by unilateral act.[11] Although, as a rule, the creation of the

[5] Miller v. Smith, 92 Ga. 154 (1893); Restatement of the Law of Trusts, 1935, sec. 12.

[6] 1937, sec. 12.

[7] King v. Stowell, 98 N.E. 91, Mass., 1912.

[8] Great Britain: Trustee Act, 1925, sec. 40; United States: Glazier v. Everett, 112 N.E. 1009, Mass. 1916; Reilly v. Conrad, 78 Atl. 1080, Del. 1911; Reichert v. Missouri & Illinois Coal Co., 83 N.E. 166, Ill. 1907.

[9] Wetmore v. Porter, 92 N.Y. 76 (1883).

[10] Western R. Co. v. Nolan, 48 N.Y. 517 (1872).

[11] M. Brunner, Wesen und Bedeutung der englisch-amerikanischen Treuhand (Trust). Diss. Bern, 1931.

trust appears to involve transfer of the trust property to the trustee, this is but a consequence of the unilateral creation of the trust which takes place independently of the transfer. This is shown by the following: in case there is merely a unilateral declaration to devote specific property to a trust, and the settlor has not designated himself as trustee, in such event, as has already been observed, a trust is nevertheless constituted, and the court will appoint a trustee. Obligations of the trustee as such to the beneficiary cannot be reckoned against claims which the trustee has against the beneficiary in his personal capacity, i.e., not in connection with the trust relationship.[12] After the creation of the trust, the settlor has no action against the trustee to perform the trust and, *a contrario*, the beneficiary cannot assert claims against the settlor but only against the trustee.[13] Once the settlor has dedicated certain assets as a trust, it automatically comes into being, protected by the right of action of the beneficiaries and the control exercised by the courts.

2. Charitable trusts are characterized by their eleemosynary purpose. In consequence, their beneficiaries ordinarily are not persons previously ascertained but frequently must first be selected from a larger group. Charitable trusts are not subject to the rules against perpetuities. For the rest, charitable trusts exhibit the same structure as private trusts. Both types of trusts are included in the term express trusts.

3. In case of error, fraud, duress, unlawful conduct, as well as of unjust enrichment, the law normally provided only an action for damages. Here also chancery has given relief. For example, if instead of damages the victim of error seeks to recover his property, the chancellor considers the legal owner as a constructive trustee under a duty to restore the thing with all its produce and profit to the party in error.[14] Thus, upon demand of the constructive beneficiary, equity does not recognize a transfer of property which has validly taken place according to law, and nullifies its effects. In essence, this constitutes a suit to recover property. Correspondingly, in the case of a constructive trust, setoff, lien rights, and counterclaims are admissible without any restriction; the parties can freely stipulate concerning the claim; the assets covered by the constructive trust are not segregated; there is no judicial supervision and no duty to earmark (the obligation of the trustee under an express trust to keep all the trust assets at all times separate and designated as such). The rules against perpetuities do not apply; instead there are periods of limitation, which perforce in equity are not precisely fixed. If the con-

[12] Abbott v. Foote, 15 N.E. 773, 146 Mass. 333 (1888).

[13] Restatement of the Law of Trusts, sec. 200 and Comment (a).

[14] On constructive trusts, *cf.*, Costigan, "The Classification of Trusts as Express, Resulting, and Constructive," 27 Harvard Law Review (1914) 437.

structive trustee has already alienated the property, its place is taken by the duty of counterperformance; hence there is real subrogation. Instead of this, suit can also be brought against the third party purchaser, unless he is a bona fide purchaser for value. Irrebuttable presumptions make it possible to trace even money intermingled with other funds.

In the exposition of the private trust, it has been indicated how the third party, unless he is a bona fide purchaser for value, can be required to restore the illegally acquired trust property. The third party in such case is treated as a constructive trustee. The same applies to the express trustee himself as respects everything which comes into his personal estate through violation of his duty. Both express and constructive trusts were developed by chancery and hence pertain to equity. Yet they present two different legal institutions. The constructive trust is a general legal remedy, which as such may also be applied in the case of an express trust.

Finally, the resulting trust is in effect a species of constructive trust.

II

As the preceding section has shown, the trust is intimately related to the duality of law and equity. The civil law is unfamiliar with such a dual system of law; it forms a single, self-contained legal system. This is the source of the difficulty of defining the trust in the language of the civil law, in which the concepts of legal and equitable rights are not available. However, unless it be possible to introduce the trust into the logical structure of the civil law, it cannot be explained how it is to be treated for the present purpose.

By express trust, according to Lepaulle, property becomes autonomous and is dedicated to a defined purpose. The trust is a *patrimoine affecté* or *Zweckvermögen* (property devoted to a purpose); against this, not against the trustee, the claim of the beneficiaries lies; the trust as such is ascribed rights and duties against third parties; the trustee is essentially its administrator.[15] Lepaulle's construction thus far has generally been rejected. His critics argue that this theory would make the trust a juristic person, which it specifically is not. More correctly, the Roman *fiducia* and the trust were the two most important expressions of the universal concept of *Treuhand* (holding in trust), and their primary idea consisted in the fact that rights which are attributed to the fiduciary or to the trustee in his own name, must be exercised for the benefit of a third party.[16] The same view appears to be represented by Maitland, who

[15] Traité théorique et pratique des trusts, 1932, at 26 *et seq.*, and 31.

[16] Gubler, "Besteht in der Schweiz ein Bedürfnis nach Einführung des Instituts der angelsächsischen Treuhand (trust)?" Verhandlungen des Schweizerischen Juristenvereins, Heft 3, 1954, at 229a, and 245.

states that one who is under an obligation to exercise his own rights for the benefit of a third person or a defined purpose, holds such rights in trust for this person or purpose, and is termed a trustee.[17] The definition given by the accepted opinion does not need to make a fundamental distinction between express and constructive trusts. The following observations, however, must be limited in the first instance to the private trust.

We must agree with Lepaulle's critics, insofar as the common law does not construe the trust as a juristic person. However, by this Lepaulle's analysis is not yet demolished. The observations in the preceding section have shown that Lepaulle has correctly recognized what is accomplished by the trust, namely, the setting apart and dedication to a purpose of property, which is administered by the trustee. The effects of the trust can scarcely be better described than by stating that the situation is as if the trust were personified. On the other hand, the definition of Maitland just cited is not precise. In the case of both private and charitable trusts, the trustee holds his rights for specific purposes and, in both cases, for the benefit of persons—in the case of a private trust, however, these being a number of specified or clearly ascertainable persons, while in the case of a charitable trust a larger group of persons is benefited, so that those who from time to time should be beneficiaries under a charitable trust frequently must first be determined. Moreover, no objection could be derived against Lepaulle from cases in which the original intent of the settlor is not protected, or from the power vested in the settlor to retain for himself or a third party the right to alter or terminate the trust. This involves merely the grounds, defined by the instrument or the law itself, for alteration or termination of the property dedicated to a purpose. Thus, the idea underlying trusts was precisely formulated by Lepaulle; he has only insufficiently analysed the form in which this idea has been realized by the common law. It remains therefore to inquire what is the significance of the idea that the trustee is legal owner. This question may be treated best in comparison with the *fiducia*, which, according to the prevailing opinion, originated in the same conception as the trust.

Developed by the Roman law, the *fiducia* is to be found today in all civil-law legal systems. It rests upon the distinction between obligations and real rights, and the *numerus clausus* applicable to the latter. The fiduciary is a person who has assumed a personal obligation to exercise his rights entirely or partially for the benefit of the grantor (*fiduziant*). Between the latter and the fiduciary there exists an agency relationship,

[17] Lectures on Equity, 1936, at 111.

or possibly a pledge arrangement; hence, there is always involved a contractual relationship.[18] The *fiducia* may include real or personal rights, since even the latter may include no other rights than those admitted by the law of things.[19] By virtue of his real right of property, the fiduciary may make valid dispositions even when in so doing he violates his obligation. The grantor retains only a claim for damages against the fiduciary and cannot proceed against a third party. A right of exemption of assets in case of the bankruptcy of the fiduciary appears at least not self-evident. The fact that the property of the fiduciary is subject only to personal obligations thus has practical consequences; it confers upon him a position and powers which exceed the scope of his function. The fiduciary enjoys a so-called excessive legal authority; for this reason, the good faith of the fiduciary plays a greater role than, for example, in the case of the officers of a juristic person.

The medieval trust, which extended but little protection to the beneficiary, may be compared with fiduciary transactions. The development of the modern trust, however, as explained in the preceding section, has resulted in making the trustee a mere administrator and, through the intervention of equity, has deprived him of any competence which exceeds this position. Today the trustee does not have an "excessive" legal authority. Hence, good faith plays no greater role in the case of a trustee than perhaps in the case of the curator of a Swiss foundation (*Stiftung*). The circumstance that the trustee acts in his own name appears merely as a formality to be explained on historical grounds. While Anglo-American law speaks of a fiduciary relationship in the case of a trust, this involves no fiduciary relationship in the sense of the civil law, but a relationship no different than that arising, for example, between a company and its management.

The transition from the medieval to the modern trust was brought about by equity, and Weiser has endeavored to salvage the idea of good faith, or the idea of conscience, as the characteristic element of the trust by emphasizing that the extralegal concept of conscience was utilized to create equity and therewith also the trust. Conscience generates positive legal effects, among others, the duties of the trustee, as well as of third parties, who must respect the trust.[20] However, one should not be led astray by these statements. Regarded from a civil-law point of view, equity today constitutes just another body of common law. Indeed, when the chancellor commenced in the Middle Ages to intervene in questions

[18] Gubler, *loc. cit.*, 246a.

[19] Reymond, "Le trust et le droit suisse," Verhandlungen des Schweizerischen Juristenvereins, Heft 2, 1954, 170a.

[20] Trusts on the Continent of Europe, 1936, at 5.

of law, he was inspired by the intent to assist in the emergence of a more refined system of ethics as compared with the law, which in many respects had become out of date. Soon, however, the religious and ethical motives played no other role than is characteristic in any act of intelligent legislation. It is true that equity practice at the beginning appears most flexible, and thus could easily respond to the current necessities of legal life. Commencing in the 18th century, however, chancery also was controlled by its precedents; this development was the more decisive, since equity recognizes no general principle of good faith and no general prohibition of the abusive exercise of rights.[21] Therefore, equity today in many respects has become quite as rigid as law was in the Middle Ages, and there is a demand for a new equity.[22] When equity is described as an equitable law, this must be understood only in an historical but not in a general sense. The unusual feature of equity is not the nature of its legal norms but the fact that these appeared alongside of the law, while no direct alteration of the law was involved. This was conditioned by social and political considerations with which we are not here further concerned. It should merely be remarked that in Rome a similar development occurred through the praetorian edict.[23] In conclusion, it appears that Weiser's comments may be instructive for the motives which induced the chancellor in the Middle Ages to intervene in the existing order; however, it is not admissible to attribute these motives to what equity today represents.

As respects the significance of the right vested in the trustee, it remains only to determine whether this exhibits certain practical advantages as compared with the relationship between a legal person and its officers. This must be sought in connection with the functions of simulation and evasion of law, which, in addition to the function of security, Gubler regards as the three chief functions of the *Treuhand*.[24] The function of security here can be left aside. Neither in private nor in charitable trusts does it play a special role. As respects the function of simulation, it may indeed be generally concealed who is the beneficiary, and of what his benefits consist, but not the existence of the trust itself. Here consideration should not be given merely to the cases where trust property is to be recovered from third parties, or withdrawn from the trustee's creditors, or a third party sets off against claims pertaining to the trust claims he has against the trustee personally. The trustee has the duty to earmark;

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[21] Allen, Law in the Making, 1951, at 355–57, 385, 391 *et seq.*

[22] *Cf.*, David, Introduction à l'étude du droit privé de l'Angleterre, 1948, at 184 *et seq.*

[23] Bolgár, "Why No Trusts in the Civil Law?" 2 American Journal of Comparative Law (1953) 205 *et seq.*

[24] *Loc. cit.*, at pp. 234a *et seq.*

if this duty is not complied with there is danger that the beneficiary may lose his protection against third parties (doctrine of estoppel and principle of reputed ownership). In addition, the trustee must appear expressly in such capacity if he wishes to avoid personal liability. In America, more and more frequently, some trust company is appointed trustee, and in England recourse is often had to a solicitor. In both cases, only the person of the trustee is indicative of a trust relationship. Consequently, it appears that the relationship between a legal person and its officers offers the same possibilities as the legal ownership of the trustee. The curator of a Swiss foundation (*Stiftung*) for instance, customarily appears in fact in such capacity, and the assets of the foundation are designated as such; however, the provisions of the foundation charter and the persons of the beneficiaries do not have to be made known in any way.

The function of evasion of law is not always correctly understood. Illegal purposes cannot be accomplished even by means of a trust. Equity contemplated no evasion of law in the sense of the civil law, but a modification of the law, in which, as already stated in the critique of Weiser's views, the only unusual feature lies in the fact that the modification of law was accomplished by the creation of a second, competing system of law.

The foregoing analysis may be summarized in the sense that the primary concept of the trust is not the right vested in the trustee, but the idea developed by Lepaulle of a *patrimoine affecté*. The appearance of the trustee as legal owner depends upon local and historical circumstances; were the trust to be construed, for example, as a juristic person, it would thereby neither gain nor lose anything essential. Hence, the civil law should not blindly confuse the trust with the right vested in the fiduciary. The following remarks indeed will show that not only is there no necessity to do so, but that this does not at all comport with the fundamental conceptions of the civil law.

Misled by the dicta of double ownership and splitting of ownership, as the relation between law and equity in England and America in the case of the trust is at times schematically labelled, the prevailing opinion among civil lawyers has envisaged in the trust primarily a division of title as in the case of usufruct, controlled lease, etc.[25] Consequently, either the trustee is regarded as owner and the beneficiary as holding a limited or quasi-real right, or the beneficiary is owner and the trustee has a right

[25] Patton, "Future of Trust Legislation in Latin America," 20 Tulane Law Review (1946) 542; *Id.*, "Trust Systems in the Western Hemisphere," 19 Tulane Law Review (1945) 398; Nussbaum, "Sociological and Comparative Aspects of the Trust," 38 Columbia Law Review (1938) 408; Alfaro, cited by Patton.

of administration in rem. The distinction between real rights and quasi-real, viz., obligatory rights with enhanced effects, does not need to be considered here, since in the above connection this has no significance, all such rights being treated the same as real rights.[26] For these, there is a *numerus clausus*. Many authors believe, therefore, that the door to the civil law would be opened for trusts as soon as the number of real rights were extended to the right of administration of the trustee or the right of protection of the beneficiary, in each case including subrogation.[27] As against this, Gubler justly observes that real rights are not merely limited by the *numerus clausus*, but in their content also constitute definite types, and that in view of the widely differing powers of the trustee from case to case, the catalogue of real rights would then be enlarged not only by one but by an unlimited number of new rights, and hence become obsolete.[28]

Apart from this, however, there is certainly no possibility for the civil law to construe the position of the trustee as a right, be this a real or any other right. What is involved are only duties and powers; the trustee cannot exercise his legal ownership in any way for his own benefit. In the civil law, a right that per se comprehends only duties and powers appears inconceivable. Thus, in the case of the *fiducia*, the legal bond is constituted by the obligatory relationship and is in no way founded in the proprietary title itself. And further: to correspond justly to the trust, this title must be susceptible of being withdrawn at any time from the person entitled, and transferred to another; if temporarily there is no one entitled, this must not affect the existence of the right; the person entitled should be able to obligate the right as such, and if thereafter a new party entitled is named, then the claim of the countercontracting party is to be asserted against the latter; in the case of a change of the party entitled, the usually prescribed forms of transfer may be omitted. It is clear that such requirements fit neither in the framework of property nor of any other right of the civil law. Furthermore, whenever it is thought in the civil law to derive the trust from the *fiducia*, and from a title vested in the trustee, the trust must necessarily be conceived as a contractual relationship. However, neither can the autonomy of the trust assets be made consonant with such construction, nor their dedication to a purpose satisfactorily explained. The latter difficulty has already been hinted at

[26] Reymond, *loc. cit.*, at 169a *et seq.*

[27] To the same effect, Gerstle, Das reine Treuhandgeschäft im schweizerischen Privatrecht, Diss. Bern, 1917; Siebert, Das rechtsgeschäftliche Treuhandverhältnis, 1933.

[28] *Loc. cit.*, at pp. 362a.

by Reymond.[29] Moreover, to benefit third parties would be made difficult or indeed impossible. A third party acquires in the civil law at the earliest by his declaration of acceptance an irrevocable claim, which naturally is impossible in the case of a beneficiary not yet in existence. Hence also, as is shown in the preceding section, the common law does not treat the trust as a contractual relationship but as a form constituted by unilateral act, analogous to the establishment of a foundation in the civil law.

Between double ownership in law and equity, and division of property, as in the case of usufruct, for instance, only in external appearances does a parallel exist. Equity not only has split off rights from the property of the trustee, but it has transformed this property. In the course of centuries, the legal ownership of the trustee has become a mere authorization to administer the trust in accordance with its purpose. This, compared with property, is not merely a *minus* but an *aliud*. That from the viewpoint of property in a general sense, namely, assuming the fusion of law and equity in a single legal system, the trust as such, and not the trustee, is to be regarded as owner, not merely may be recognized in the contemporary stage of development of the trust, but has been clearly expressed lately in America in the doctrine, the case law, and in part in statutes. The point of departure for the arguments to this effect is the circumstance that the trustee, without subjecting himself to liability, may obligate the trust as such. Scott explains this as follows: "The trust indeed cannot be personified, for, according to Hohfeld, legal relations are possible only between persons but not between persons and things" (on which it may be remarked that, if the trust were personified, legally speaking, there would be a legal subject, and no longer would mere things be involved). "On the other hand, the trustee today is no longer to be considered as owner but as administrator; as in the case of principal and agent, the trustee may assume obligations within the framework of his authority for the trust estate (not for the beneficiary!)".[30] This reasoning was adopted by the court in *Tuttle* v. *Union Bank and Trust Co.*[31] According to Section 7914 of the Revised Code of Montana also, the trustee is an agent for the trust property. The same construction appears in the case of *Purdy* v. *Bank of American National Trust and Savings Association.*[32] In *Eaton* v. *Ballentine,*[33] the court held that the trust res might be regarded in equity as the debtor. Bogert, to be sure, does not see in the

[29] *Loc. cit.*, at pp. 192a.
[30] The Law of Trusts, 1939, at 1529 *et seq.*
[31] 119 Pac. 2d 884 (1941), Mont. 1941.
[32] 40 Pac. 2d 481 (1935), Cal. 1935.
[33] 8 N.E. 2d 808 (1937), Mass. 1937.

trust a legal person, but rather a legal entity.[34] From the civil-law viewpoint, however, legal entity and legal person are the same, and in the common law this distinction merely serves to obviate the license regarded as necessary for a legal person.[35]

The same development appears in conflicts law. Recent American authors customarily devote a special chapter to the trust, which they consider as a self-contained autonomous legal institution. As respects immovables, trusts are exclusively governed by the *lex rei sitae*. As regards movables, a distinction is made between validity and administration: the former, in the case of a testamentary trust being subject to the *lex domicilii defuncti*, and in the case of an *inter vivos* trust to the *lex rei sitae* or the *lex loci transactionis*, as the case may be; the latter, on the contrary, always to a single law and, in fact, to that contemplated by the settlor.[36] If no intention can be shown, the courts investigate with what state the trust has the closest connection;[37] however, the choice rarely falls to a legal system which is unfavorable to the trust concerned. The line between validity and administration is still somewhat in flux, yet constantly more and more issues are referred to the latter.[38] According to Croucher, the *lex rei sitae* should govern only the transfer of title to the trustee,[39] since this is always applicable to issues regarding transfers of property. Correspondingly, in the case of testamentary trusts, the *lex domicilii defuncti* can have significance only for the validity of the will establishing the trust.[40] The view of Lepaulle, according to which the trust—just like a company—is principally to be governed by the law of the "seat,"[41] correctly characterizes the tendency underlying the decisions. The only difficulty appears still in the case of immovables—the ancient control of the *lex rei sitae*. The English courts apparently follow the same principles as the American.[42]

So long as the duality of law and equity continues, the common law

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[34] Trusts and Trustees, 1935, sec. 712.

[35] von Sinner, Das Recht der Partnership in den Vereinigten Staaten von Amerika, 1955, at 16.

[36] Restatement of the Law of Conflict of Laws, 1934, sec. 297 and 298.

[37] Swabenland, "The Conflict of Laws in the Administration of Express Trusts of Personal Property," 45 Yale Law Journal (1935) 438.

[38] Land, Trust in the Conflict of Laws, 1940, at 10 *et seq.*; Rabel, 2 The Conflict of Laws, Michigan Legal Studies, 1947, at 14.

[39] "Trusts of Movables in Private International Law," 4 Modern Law Review (1940) 111.

[40] To the same effect, Hoar, "Some Aspects of Trusts in the Conflict of Laws," 26 Canadian Bar Review (1948) 1415; also Land, *loc. cit. supra* at 207 *et seq.*, and the discussion at 10 *et seq.*

[41] *Loc. cit.*, at 411 and 414 *et seq.*

[42] Lepaulle, *op. cit. supra* note 15, chapter XI, §1.

obviously does not have to abandon its construction of legal ownership so as to personify the trust in all its forms. This coexistence of two bodies of law makes it possible, with the co-operation of equity, to transform an existing concept of law without external alteration into a new concept. The monolithic legal order of the civil law, on the other hand, does not admit such possibilities. Therefore, the legal ownership of the trustee should not be equated with civil-law property. Although Liechtenstein, which has received the trust, makes the trustee owner, yet the ownership of the Liechtenstein trustee has only the name in common with normal Liechtenstein ownership; in their nature the two are different. When England and most of the American states consolidated the courts of law and chancery, there was no substantive fusion of law and equity; the preservation of this division was maintained above all with reference to trusts. Pascal has pointed out that the trust assumes that alongside of the ordinary legislator there should be another authority with power to issue binding norms.[43] This is correct in the sense of showing how the common law has formed the trust, precisely through the interaction of law and equity.[44]

In this context, consideration is still to be given to the controversy whether the claim of the beneficiary is personal or real.[45] According to Maitland, the first solution is correct because equity acts in personam. This maxim, however, has significance only in connection with execution; real actions also lie against persons. Personal claims, in general, operate only *inter partes*; real claims, on the other hand, also against third parties. This has led the civil lawyers to declare the rights of the beneficiary as real, and Bogert, Scott, and Pound have adopted this view. Fundamentally, however, the very formulation of the question is incorrect, and it seems significant that this entire discussion stemmed from Germany, a civil-law country.[46] As shown in the preceding section, the right of the beneficiary against third parties consists basically in the claim of restoration or restitution to the trust, and this only insofar as the trustee himself does not act, or there is temporarily no trustee to do so. In principle, the same situation is involved as when the beneficiary of a foundation or a member of a company proceeds in place of management prevented or failing to act, an eventuality contemplated for example by Article 754 f. of the Swiss Law of Obligations (OR). To justify such a right of action, no real right in the assets of the juristic person or legal entity is

[43] Address at Congrès International du Droit Privé, Rome, 1950.
[44] *Cf.*, also Gubler, *loc. cit. supra*, at 275a.
[45] Lepaulle, *op. cit.* at 23 *et seq.*; Land, *op. cit.* sec. 47.
[46] Maitland, "Trust und Korporation," 32 Grünhuts Zeitschrift (1904) at 3 and 6.

necessary. The jurists in question, namely those in Germany, were led to assume such a right, since they incorrectly envisaged in the trust a fiduciary legal relationship in the sense of the civil law. Regarded from the viewpoint of the theory of real rights, a third party, who holds trust property unlawfully, may keep it, provided only that he himself recognizes the rights of the beneficiary. In the case of the trust, however, this evidently is not permissible; there must be restitution to the trustee. According to Schultze, the title of the fiduciary is subject to a condition subsequent, and in case of a violation of faith the right reverts to the principal.[47] By this construction, in the case of a trust, misconduct on the part of a trustee would constitute ground to dissolve a trust, which likewise is not correct.

As soon as one envisages the essence of a private trust as an autonomous property dedicated to a purpose, it must fundamentally be distinguished from the constructive trust. According to the exposition in No. 3 of the preceding section, such a distinction appears clearly indicated. In its contacts with the civil law, the constructive trust presents no difficulties: he who successfully asserts a constructive trust for his own benefit is to be regarded as owner. This presents a situation analogous to Article 31 f. OR, to which Gubler has already drawn attention,[48] and the duties of the constructive trustee in principle correspond to those of an unlawful possessor, thus, in Swiss law to Article 938 ff. of the Swiss Civil Code (ZGB) and Article 423 of OR. On the other hand, there is no fundamental difference between private and charitable trusts. This also seems justified. The charitable trust has always been regarded as property dedicated to a purpose, and thus in structure it is like the private trust; it is characterized only by the special nature of its purpose, as well as its exclusion from the rules against perpetuities. At the present time, the American doctrine is commencing to distinguish between trusts and restitution. Under the former are included express trusts, namely, private and charitable trusts, while constructive trusts are included in the latter, together with further remedies created by equity, as well as the quasi-contract which pertains to law.[49] The Restatement has largely taken over this classification. In the present article, in what follows, by trust only the express trust is meant.

In conclusion, the analysis in this section may be summarized as follows: The duality of law and equity gives to the common law a structure

[47] Cited in Siebert, *op. cit. supra*, at 215.

[48] *Op. cit. supra* at 411a.

[49] In this context *cf.*, Durfee and Dawson, Cases on Remedies, Vol. II, Restitution at Law and in Equity, 1946.

entirely different than that exhibited by the civil law. The common law has seldom been subjected to sudden reforms but, nevertheless, in the course of its centuries-long development has undergone many changes, which, at least for the most part, have not even found expression in its terminology. If one is to conceive from the civil-law viewpoint a common-law institution like the trust, one must not stop with the external forms, nor treat the Anglo-American concepts without more as equivalent to those of the civil law, nor fail to take account of the differences between the medieval English law and the contemporary common law. Rather it is necessary, in the first place, to visualize the functions of the trust, which, as shown, consist in that property is given autonomy, and is administered by the trustee for the beneficiaries in accordance with the purpose prescribed by the settlor. In the second place, it must be ascertained how the same may be realized in the civil law, which is undertaken in the following section on the basis of the Swiss law.

III

1. *The Foundation.* According to Article 80 ZGB, a foundation consists in the "dedication of a property for a particular purpose." In the same manner, Windscheid speaks from the viewpoint of general civil law (*gemeines Recht*) of property "that is destined to be utilized for the realization of a certain purpose external to the property."[50] This closely corresponds to Lepaulle's definition of the *patrimoine affecté.* In structure also, there prevails the most complete correspondence between trust and foundation, to which Bloch has already referred.[51] The purpose of the foundation corresponds to that of the trust; the distinction of private and charitable trusts approaches that of private and public foundations. Autonomy of the property is inherent in the foundation, and its administration and enjoyment are per se separated. Trust and foundation do not constitute contractual relationships but are created by the unilateral act of the settlor or founder. The beneficiary is like the *destinataire,* and the trustee like the council or curator of a foundation.

The decisive difference between trust and foundation is ordinarily regarded as the fact that the latter is formed as a juristic person and the former not. The foundation as such is the holder of its assets, and in respect thereof acquires rights and duties, the council or curator of the foundation acting as its organ. In the case of the trust, the trustee currently appointed acts in his capacity as holder of the trust property; the

[50] 1 Lehrbuch des Pandektenrechtes, 1906, at 261.

[51] "Der angloamerikanische Trust und seine Behandlung im internationalen Privatrecht," 46 Schweizerische Juristenzeitung (1950) 65.

rights and duties involved arise in the person of the trustee as such. As the two preceding sections have shown, the trust property is in effect thereby made autonomous in the same manner as the property of the foundation, and the trustee has the same position as the organ of the foundation. The distinction in question, consequently, remains one merely of legal technique. When it has been sought to see more in this distinction, such views are to be referred to the so-called "substance" theory (*Wesenstheorie*) which perceived in the juristic person a real phenomenon of life analogous to the individual human being or, as Steinbüchel expresses it, endeavored, "to fathom and to comprehend the juristic person from the nature of the legal subject invested solely with this quality."[52] According to contemporary views, however, the juristic person is as a rule properly regarded as a juristic device. In consequence, no irreconcilable contradiction is presented in case one legal system construes a particular relationship as a juristic person and another does not. If, as intimated in the preceding section, it is stated in the American doctrine and judicial decisions that the trust forms a legal entity and the trustee is the administrator of the trust property, there is surely no violation of the spirit of the trust if from the civil-law viewpoint it is deemed equivalent to an independent subject of rights.

Riedweg sees a fundamental distinction between foundation and trust in that the beneficiary of a foundation has only personal claims against it, and none against the property of the foundation itself.[53] This argumentation bypasses the heart of the matter, since, except for a person who acquires in good faith, the property of the foundation is reserved against everyone to the foundation and thereby to its purpose and beneficiaries.

In the civil law, custom and later legislation have frequently limited foundations to religious and beneficent purposes. The ZGB also recognizes family foundations, but according to Article 335, they can be created only "to provide the costs of education, outfitting, or support of members of families, or similar purposes." As the statutory definition, reproduced at the beginning of this section, already shows, such limitations of the purpose of foundations are in no way conditioned by its nature. Following certain cantonal laws, the preliminary draft of the ZGB abstained from limiting the purpose of family foundations in any way. The fact that the draft and later the statute did not go quite so far is

[52] Organ und Hilfsperson, Diss. Zürich, 1947, at 23.

[53] "Der Trust des anglo-sächsischen Rechtes im Vergleiche zu ähnlichen Institutionen des Schweizerischen Rechtes," Festgabe für den Schweizerischen Anwaltstag, 1953, at 111.

attributable to motives of legal policy.[54] Anglo-American law also imposes limitations on private trusts, to be sure, not by allowing such only for certain defined purposes, but by limiting their duration. On the other hand, the foundation, so far as the statute is concerned, is subject to no limits in time. (Yet the donor can limit its duration; moreover, the foundation terminates with the accomplishment of its purpose.)If the civil law had developed rules against perpetuities, it would have imposed regulations on foundations much more freely. With the exception of the principality of Liechtenstein, of all the continental European laws, Switzerland has always treated foundations the most sympathetically.

The institution of the foundation would allow itself without more to be developed so as to take over the functions of the trust. The defects which, according to Lepaulle,[55] pertain to the foundation as contrasted with the trust may be correct for the formation which foundations have assumed at the present time in most laws; yet these deficiencies are in no wise inherent in the nature of foundations. As frequently there has been a tendency in the case of foundations to identify the institution itself with these historically and politically conditioned limitations, the expression personified estate is employed in what follows.

2. *Statutory representation.* An estate in bankruptcy, as well as that of a decedent in the hands of an executor, or subject to official administration, constitutes another type of purposebound, autonomous property. In these cases, the Anglo-American law resorts to the trust or originally proceeded therefrom. In Swiss law, as generally in the civil law, bankrupt and decedents' estates become separate estates, which continue to exist by real subrogation, and to which the bankrupt and the heirs remain entitled, being however restrained in their power of disposal, which passes to the statutory representative, namely, the administrator in bankruptcy, the testamentary executor, or the official administrator, yet only to the extent that this is necessary to perform the functions of the statutory representative as defined by the will or by law: in the case of bankruptcy, orderly satisfaction of creditors, and in the case of testamentary execution, and also official administration of an inheritance, performance of the directions of the deceased and liquidation of the estate. If the statutory representative does not comply with this duty, then he is replaced by the official board of control or the court. With the exception of acquisitions by third parties in good faith, inadmissible dispositions of property subject to statutory representation remain without effect.

[54] Egger, Kommentar zum ZGB, Personenrecht, 460.

[55] *Op. cit. supra*, at 54 *et seq.*

Differently from the cases of bankruptcy and official administration of inheritance, testamentary execution originates in a legal transaction. It can be provided for the life of the heir. Whether this also applies to residuary heirs (*Nacherben*), as Gerhart assumes, is still uncertain.[56] The administration and the benefits of the estate remain separate. For the administration of capital and income, the decedent may make provisions in his discretion, for example, that during the period of a testamentary administration only the income should go to the heir, or that payments may be made only for purposes of dowry. In this framework, testamentary execution may take the place of the family foundation, including the otherwise not admissible, so-called foundation for support, and hence, as Wyler has already shown,[57] of a trust; the differences between trust and testamentary execution pertain to legal technique. The person entitled to the property is not the testamentary executor who corresponds to the trustee, but the heir who corresponds to the beneficiary. As the term itself discloses, testamentary execution is limited to dispositions on account of death. Considering that such may be provided at least for the life of the heir, it would not contradict the nature of testamentary execution if, like the trust, it also found application to legal transactions *inter vivos*. Even so, statutory representation would not provide a complete substitute for the trust. In the more complicated situations, it might not always be easy to determine the parties entitled, and a change in such parties, i.e., those entitled, would frequently necessitate a transfer of property.

3. *Other legal institutions*. Lepaulle employs the term *patrimoine affecté* not only as a general designation for autonomous property devoted to a purpose, abstracted from a specific legal system, but regards it in addition as a legal institution *sui generis* of the civil law.[58] As Lepaulle himself defines *patrimoine affecté* in the same manner as the ZGB defines the foundation, i.e., as personified property, it is not visible how the former is to be distinguished from the latter. Hence, there is no place in the civil law for *patrimoine affecté* and legal person as two distinct structural forms of property dedicated to a purpose; such *patrimoine affecté* must be a juristic person. Lepaulle appears later to arrive at the same result.[59] On the other hand, there remain certain other phenomena to consider.

The *fideicommissum* is characterized as an unlimited sequence of rights

[56] "Die Familienstiftung nach schweizerischem Recht," 49 Zeitschrift für Schweizerisches Recht (1930) 137.

[57] "Über das Treuhandrecht," 56 Zeitschrift für Schweizerisches Recht (1937) 296.

[58] *Cf.*, Müller, in 7 Zeitschrift für ausländisches und internationales Privatrecht (1933) at 984 *et seq.*

[59] Reymond, *loc. cit.* at 137a.

to succession, so that a family estate is always inherited, for example, by the eldest son, and its substance may never be diminished. This presents a highly autonomous property dedicated to a purpose, which, however, is distinguished from the trust especially in the fact that administration and enjoyment as a rule coincide. *Fideicommissa* today have been almost everywhere abolished, or at least their creation is prohibited. The institution of residuary heirs, according to Article 488 ZGB and certain other continental European laws, may be regarded as a species of *fideicommissum*, which lapses after the first succession by a residuary heir. Institutions of residuary heirs, not formed as trusts, are also found in the common law, under which corresponding conveyances can also take place inter vivos.[60] These are subject to the rules against perpetuities.

A recent decision of the Bundesgericht[61] involving a fiduciary legal relationship has admitted in two special situations the same solution as in the case of a trust, and thereby—for the two particular cases—given the fiduciary property a certain autonomy. This was possible in both cases without doing violence to the existing legal order, and no fundamental assimilation of fiduciary legal relationships to the trust occurred. This indeed, as shown in the preceding section, would necessarily lead to insoluble conflicts with the civil-law system. In an earlier decision,[62] the Bundesgericht assumed that a loan under a trust arrangement could be admitted without more in Swiss law. As Weiser has already remarked,[63] however, the Bundesgericht did not have a correct idea of the trust; it was, for instance, of the opinion that the debtor and the settlor could give directions to the trustee which were not only prejudicial to the beneficiaries, but also contrary to the instrument, and that the trustee would have to follow them.

Amid the great variety of trusts, occasionally the effects of a particular trust can also be attained by civil-law institutions such as otherwise can in no sense substitute for the trust. Therefore, it is not permissible to generalize such cases. The Swiss investment trust offers an example, in which through a clever combination of joint property, agency, and deposit the same object has successfully been attained as by an Anglo-American investment trust, the distinction from the latter again remaining of a merely technical nature.

4. *Conclusion.* Both Reymond and Gubler in their penetrating researches have established that the trust can find no place in the system

[60] Information given by Professor Robert Pascal, Baton Rouge, Louisiana.
[61] 78 BGE II. 1952. 445.
[62] 62 BGE II. 1936. 140.
[63] *Cf. op. cit.*, note 20 *supra*, at 49.

of the ZGB and the civil law.[64] This is certainly correct so long as it is sought with both of these authors to bring the trust within the framework of fiduciary legal transactions and real rights, and this merely reinforces the results reached in section 2. The difficulties recognized by Reymond and Gubler in their search for a solution disappear, however, as the preceding observations show, as soon as one perceives in the common-law trust the personified property or statutory representation of the civil law. These are the two legal institutions—statutory representation, however, in a limited sense—through which the civil law can reach the same ends as the common law does by means of the trust. It is true that at the present time most civil-law states limit personification of property and statutory representation to a much narrower sphere than does the common law the trust. Yet the limitations concerned are not of a systematic nature, and could be removed without more by statutory amendments. If, therefore, the civil-law codifications should endeavor to approach the trust idea more closely than before and without betraying their inner structure, this should take place by a more liberal construction, particularly of personified property. Furthermore, Gubler also advocates instead of a reception of the trust, among other things more flexibility in the law of foundations,[65] and in so doing recognizes relationships between these two institutions. While the former method is not yet shown by Gubler in its full extension, this is really only due to the defective theory of the trustee's individual title. How far statutory representation and legal person may be regarded as basically related, and the former as only an incomplete form of the latter, is clear from a decision of the Bundesgericht that characterizes an estate in official liquidation, hence property subject to statutory representation, as separate property "which in certain respects must be ascribed the nature of a subject of rights, i.e., a legal person."[66]

As concerns the protection of a property devoted to a purpose and thereby of the beneficiaries, this in Swiss law, as in the civil law generally, remains limited to the existing proprietary and possessory actions, which do not go as far as the constructive trust. This difference between common law and civil law is to be found, however, not only in the case of a trust but in general, thus in the case of error, fraud, duress, unjust enrichment, and unlawful conduct. If the civil law were to make a concession in one respect here, consistently it would have to do so in all cases. One may just as well be satisfied with the existing situation, even in the

[64] Reymond, *loc. cit. supra* at 209a; Gubler, *loc. cit. supra* at 431a *et seq.*

[65] Gubler, *loc. cit. supra* at 460a *et seq.*

[66] 55 BGE III. 1928. 178.

case of property devoted to a purpose, and the protection of the beneficiary does not in any sense become a pale shadow as Gubler fears,[67] for it can not seriously be asserted that our possessory and proprietary actions are mere shadows.

In more recent times, certain civil-law states have sought to receive the trust in one form or another. Louisiana did so *tel quel*,[68] but today theory and practice under the Louisiana Code are strongly under the spell of the common law. Reference has already been made to the trust in Liechtenstein, and it should be added only that in Switzerland it is treated as an autonomous subject of rights.[69] Mexico, influenced by Lepaulle, has construed the trust as personified property.[70] The trust in the law of Quebec, according to one, is to be regarded as a juristic person, yet according to another, as a statutory representation analogous to the Swiss testamentary execution.[71] Panama, following Alfaro, has interpreted the trust as an irrevocable mandate under which the property passes to the agent.[72] It remains uncertain how under this construction the autonomy of the trust property is solved.

The analyses in these sections have shown not only *de lege ferenda* how the civil law may develop from its own resources an institution similar in effect to the trust, but also how it is now possible *de lege lata* to allow foreign trusts without difficulty to participate in internal legal commerce.

IV

The prevailing tendency among civil lawyers to regard the trustee as owner and the beneficiary as having a limited real right, can never lead to a satisfying solution of the question stated at the outset of this paper, namely, how a trust is to be treated in a civil-law country. On account of the *numerus clausus* in domestic law, only such real rights can be created as the domestic legal order permits, and even those created abroad can be recognized in the domestic forum only when they correspond to a domestic type.[73] The same applies to rights arising from obligations. Above all, the French courts, from time to time, have had to deal

[67] *Op. cit. supra* at 401a.

[68] Wisdom, "Progress in the Codification of Trusts," 14 Tulane Law Review (1940) 165, especially at 187; *id.*, "A Trust Code in the Civil Law," 13 Tulane Law Review (1939) 78.

[69] 18 Zeitschrift für Beurkundungs- und Grundbuchrecht (1937) 57.

[70] Information given by Mr. Esniega in Chihuahua; Wisdom, "Trusts in Terms Adapted to the Civil Law," Address at the Fifth Conference of the Inter-American Bar Association, 1947.

[71] Mankiewicz, "L'assimilation du trust à titre gratuit dans la Province de Québec," Address at Congrès International du Droit Privé, Rome, 1950.

[72] Patton, *loc. cit. supra*.

[73] Lewald, Das deutsche internationale Privatrecht, 1931, at 177 and 184.

with trusts;[74] for the most part the decisions have corresponded to those at common law, with reasonings, however, which, apart from the particular case, would reach the opposite results. Thérèse Lyon has remarked on this that the French courts have recognized the trust only for the reason that they have remained in ignorance of its nature.[75]

The difficulties involved in doing justice to foreign trusts in civil-law jurisdictions, however, disappear as soon as trust property located in a civil-law state is treated as if it belonged to a juristic person. As appears from the two preceding sections, practically all the specific effects of the trust may be reached in this manner, and indeed without violating the civil-law system. Foreign juristic persons or similar legal structures are admitted in municipal legal commerce even if they do not in detail correspond to domestic legal types.[76] The only limitation is to be found in public policy (*ordre public*). The fact that a trust is not considered a legal person by its own law is no hindrance to doing so insofar as the trust in question comes into contact with the civil law. Here appears a case for the application of transposition as described by Lewald and recognized by the courts.[77] In accordance with this, the judge who has to enforce a foreign legal institution, should translate it into that domestic institution whose effects best correspond to those of the foreign institution; in other words, the decisive factor is conformity in substance, and the form should be chosen accordingly. The circumstance that a partnership in one state is regarded as a juristic person and in another not as such, has in fact caused no difficulty for the international recognition of such partnerships. In any event, public policy in Switzerland forms no impediment for the recognition of trusts. In fact, most private trusts correspond to the so-called foundations for support which the ZGB does not allow. However, the private trust, contrary to the foundation, is subject to the rules against perpetuities, and by the institution of a residuary heir in connection with a testamentary execution, it is equally possible in Switzerland to accomplish at least for the benefit of the primary heirs (*Vorerben*) the effects of a foundation for support. No one would assert that America is less democratic in its thinking than Switzerland. An exception is to be made only for cases where a particular trust would lead to evasion of mandatory internal legal rules, among which above all are those of commercial or security law. However, these remain exceptions.

Pursuant to the preceding observations, the criticism of two decisions

[74] These decisions are cited by Nussbaum, *loc. cit. supra*, note 25.

[75] Clunet, Journal du droit international (1933) 681.

[76] Rabel, *op. cit. supra*, chapter 22, especially at 131, 133, and 137.

[77] Règles générales des conflits des lois, 1941, at 129 *et seq.*

from Geneva[78] and Zurich[79] is unjustified, in the first of which an English, and in the second a Leichtenstein trust, were regarded as juristic persons for purposes of Swiss law.

In detail, the result is as follows: All trust property located in Switzerland is to be regarded as belonging to the trust, as well as whatever the trustee acquires here in his capacity as such. If he does not appear as trustee, then a case of indirect representation occurs. In the *Grundbuch* for the purposes of registration, the trust is to be entered as owner, as has been decided in the case just cited of the Zurich Obergericht. In American states with a system of registration, the same is today required.[80] It follows from what has been said that the creditors of the trustee cannot seize the trust property. The trustee forms the organ of the trust; consequently the scope of his authority depends, as in the case of juristic persons, upon the law of the state to which the trust belongs,[81] namely, to which its administration is subject. Therefore, in Switzerland unauthorized acts of the trustee are without effect, to the same extent as under the Anglo-American *lex administrationis*. The reservation of the *lex rei sitae* for immovables remains without significance in relation to Switzerland, not only since Switzerland has no trust law, but also since the influence of the *lex rei sitae* in Swiss conflicts law is much less significant than in the Anglo-American. In particular, this plays no role in the case of juristic persons. Legal transactions, which the trustee as such, and within the scope of his authority, has entered into, give rise in Switzerland to a suit against the trust by which the creditor can reach trust property. This corresponds to the provisions of the Uniform Trust Act, yet also in the case of trusts from states which do not follow the principles of this Act, no justified interests will be prejudiced by direct attack upon the trust property. Change of trustee constitutes change of the organ and in this way may be construed exactly as in the common law, nor do vacancies offer difficulties, since the trust is the holder of rights. The only essential point in which Switzerland, like the civil-law states generally, lags behind the common law is the more restricted protection in case of violations of the trust itself, inasmuch as vindication, protection of possession, and the rules applicable to conduct of another's business in one's own interest, as already indicated, do not completely cover the possibilities of the constructive trust. But in these cases, at least

[78] Clunet, Journal du droit international, 1874, at 334.
[79] *Cf.*, Part III *supra*, note 69.
[80] In re Buckelew's estate, 13 Atl. 2d 855; 19 Atl. 2d 779 (1941).
[81] Schnitzer, Handbuch des internationalen Privatrechtes, 1944, at 284.

de lege lata, there can be no assimilation whatsoever; this difference, however, should not be overemphasized.

As has been shown, statutory representation in the ZGB, as well as in the civil law generally, is provided only for testamentary execution and certain special cases. Therefore, the question immediately arises whether *ex hypothesi* statutory representation as a second possibility for transposition of the trust comes into question only in the case of testamentary trusts. This, however, is not the case, since testamentary execution is not limited to the administration of decedents' estates, and its connection with the law of inheritance, which is mainly historically conditioned, is of a more accidental nature. However, the grounds set forth in section 3, No. 2, which show that personified property is more appropriate for the reception of the trust than statutory representation, retain their significance also in the present connection.

In view of the fact that in Switzerland a foundation may be established, or a testamentary execution ordered, but no trust created, only such trusts, naturally, may participate in domestic legal commerce as a foreign legal system regards as subject to its control, that is to say, the latter must claim the administration of the trust. There is to be added a further assumption. The two most important elements of the trust are its property and its administration. If both are predominantly and permanently located in Switzerland, this would, in effect, constitute a Swiss trust. So far as such a trust can not be upheld by the doctrine of *Konversion* as a *Stiftung* or *Testamentsvollstreckung* conforming to the existing municipal law, there would be an inadmissible evasion of Swiss law which does not permit the creation of trusts. Such a trust therefore could not be recognized in Switzerland and would be regarded as void.

B. A. WORTLEY

Observations on the Public and Private International Law Relating to Expropriation

I. THE GENERAL PROBLEM OF EXPROPRIATION

THE INTERNATIONAL ASPECTS OF EXPROPRIATION raise many jurisprudential questions relating to claims to property. It may be useful to consider some of them in their simpler forms, before embarking on a more detailed discussion of the relevant public and private international law.

When, by the action of State E, O, an owner, is expropriated, the legal bond between O and the thing claimed by him is severed by the law of State E, and, *by that law*, O is no longer regarded as having an enforceable claim to the thing expropriated; State E thenceforward accords to itself, or to its nominee, the protection of an owner in respect of the thing taken. This may be done by

(1) State E recognizing itself, or some other person as the new owner; or

(2) merely by State E withdrawing the protection of its courts from O, the owner expropriated, and tacitly allowing a *de facto* possessor to remain in possession of the thing seized, as did the Roman praetor in allowing *longi temporis praescriptio*.

In some cases an elaborate procedure of forced sale and arbitration is gone through to transfer the title from the owner to the expropriating authority; in other cases, the mere threat of a forced acquisition is sufficient to produce a sale by private treaty, which is, on the face of it, indistinguishable from an ordinary sale. The Nazis abused legal forms in this way.

When an *apparently* voluntary sale is forced, in fact induced, by the threat of expropriation, the owner divests himself of what property he has in the thing taken; but, even though the sale is "regular in form," he may

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afterwards request his own state, if he is a foreigner, to complain that the sale was induced by duress, and that he should be restored to his ownership of property or be compensated. Relief has been afforded to many thousands of victims of the Nazis who parted with their property by documents apparently regular in form but which in fact were obtained, by state officials, through blackmail and even by duress.

On a normal expropriation in accordance with the law of the *situs* of the thing taken, state power compels an owner to give up the *indicia* of title in accordance with special forms which openly mark the character of the act; however much an owner may be treated with consideration in arbitral or other proceedings before the expropriation, he knows that by the legal system of the expropriating state, he is bound to accept the state's verdict: though as will presently be shown, other states are not bound to accept that verdict for all purposes and in all circumstances. The 19th century English method of expropriation for public utilities was carried out by "compulsory sale," and the title of the owner was transferred to the public undertaking subject to a right of the owner to repurchase his property if it were no longer, at some later date, required by the undertaking.[1] From the point of view of the expropriator, this procedure might result in obtaining a title only when the owner was in fact himself in possession of a valid title.[2] The American theory of eminent domain was perhaps more satisfactory to the expropriator, because, although the expropriating state or authority paid the owner for ceasing to be owner, it was not deemed to acquire the owner's old title for what it was worth, but to obtain a new title by virtue of that state's right of eminent domain.[3] But whether the expropriator acquired a title by "forced sale" or by "eminent domain," it did so by virtue of the strength and efficacy of its own national legislation.

In the United States the positive abuse of the power of eminent domain is checked by constitutional safeguards based on theories of natural right.[4] The English system of expropriation for public utility under-

[1] Lands Clauses Consolidation Act 1845, ss. 127–130. Lenhoff, "Development of the Concept of Eminent Domain," 42 Col. L.R. (1942) 596, 601–3, indicates that Pothier, Domat, and Montesquieu were familiar with prerevolutionary forced sales of feudal rights, and Blackstone took this view. It is a curious fiction or adaptation of the term "sale."

[2] See s. 81 and Schedules A & B to the Lands Clauses Consolidation Act 1845. Provision is made for the expropriating authority to discharge mortgages, ss. 108–114, though in cases of doubt, by a special procedure under ss. 77–79, the expropriators could execute a deed poll and vest a title in themselves and by s. 179 they would then be deemed to be owners "until the contrary be shown to the satisfaction of the court."

[3] Lenhoff, *op. cit.* at 636.

[4] 14th Amendment to the United States Constitution: for a list of state constitutions in the United States with a provision for compensation prior to the taking, see Lenhoff, *op. cit.*, 600, note 27.

takings, by means of compulsory sale, established by the Lands Clauses Consolidation Act 1845, contained valuable *practical* safeguards for the owner. Legislation on prescription is familiar to most legal systems, and each system provides its own safeguards for the owner. However, once the safeguards laid down by the legislation of the *situs* of the thing usucapted or expropriated have been exhausted, the dispossessed owner's only possible remedies will be those afforded by public or private international law.

Now states do not always accept a foreign municipal law of prescription as conclusive with regard to the claims of an expelled owner. An international tribunal, for instance, may examine a submission that municipal law has accepted a claim based on prescription in the light of the notion of prescription current in public international law, and will not necessarily be bound by the municipal law,[5] especially when it considers that the law barring the remedy of the owner in the municipal court effects a denial of justice.[6] After all, states are interested in the economic well-being of their subjects, and a loss of foreign property usually makes the owner less able to discharge his obligations at home.

States do not need to accept foreign expropriations without question; this is shown by the practice of making the so-called "global agreements" whereby a state, after negotiation, accepts expropriations which it might otherwise call in question, and, in return for compensation, agrees not to pursue its claims on behalf of its nationals and to prevent them from pursuing their claims elsewhere.[7] Moreover, even "global agreements," like other treaties, only affect states that are parties to them; they leave other states free to evaluate a foreign expropriation whenever it comes before them as a root of title, and to take up claims of their own nationals to ensure restitution or full compensation which is not awarded by the *lex situs*. Unless a state is bound to do so by treaty, it will not usually recognize an expropriation of its subject as valid in public international law if it considers that due restitution, or at least full compensation, has not been secured. This approach to expropriation in public international law finds its parallel in the field of private international law when an owner considers that expropriation is unjust if it deprives him of his ownership so as to leave him unable to satisfy obligations that he has

[5] See Lipstein, "Conflict of Laws before International Tribunals," 29 Transactions of the Grotius Society (1944) 51, at 56.

[6] *Cf.* Agreement between U. K. and Greece, Cmd. 6780/46, Treaty Series No. 8 (1946), Article 12 of which provides that the Governments "agree to consider action for the removal of legal obstacles (including periods of prescription) or arising from the war which may prevent an equitable settlement of outstanding indebtedness."

[7] E.g., Agreements between U. K. and Yugoslavia, Cmd. 7797/49 Treaty Series No. 2 (1949), and Czechoslovakia Cmd. 7797/49 Treaty Series No. 60 (1949), each dealing with Compensation in respect of Nationalization, Expropriation and Dispossession.

assumed under various municipal laws either to his own creditors, to his family or, in the case of an ecclesiastic, to his superiors under Canon Law; such a feeling will prompt the dispossessed owner to sue in whatever home or foreign court he is advised that he can obtain restitution or damages.

There are indeed many different methods of expropriation, but, so far as the dispossessed owner is concerned, they all deprive him of making good his claims *within the jurisdiction of the expropriating state*. They do not necessarily rid the "owner" of his conviction that he *is* the owner, and that he should be entitled, if not to secure his reinstatement as owner, then at least to claim some compensation for his disappointment.

II. PROTECTION FROM EXPROPRIATION OF PERSONS NOT FULL LEGAL OWNERS BY THE *LEX SITUS*

A. Private International Law Remedies

When an owner has been expropriated by the *lex situs*, he is no longer treated as owner by that law, and it will be precisely for that reason that he will wish to reassert his claim to ownership wherever he can do so, or at least to claim that the expropriation should not be regarded as having more than a purely territorial effect whilst the thing taken remains subject to the *lex situs*. The conception of ownership is not uniform throughout the world, it is not universal, and for this reason a person may be deemed to be owner by one system of law when his status as owner is denied by another system.

Just as X may be deemed to be divorced in the legal order of state 1 and still married in the legal order of state 2, so too, an owner who has been expropriated in the legal order of state 1 may still be recognized in certain special cases as owner in the legal order of state 2. Again, the owner dispossessed by the expropriation of state 1 may nevertheless be recognized as having a claim sustainable by state 3, his national state, by procedures operating in the *international* legal order, i.e., under or by virtue of public international law. Indeed, two legal orders may even coexist within the same legal system. A may be the *legal* owner of a chattel of which B is the equitable owner by virtue of a trust accepted by A; or again, the same legal system may even contain a contradiction within itself: it may, for instance, state in its constitution that it upholds what it describes as the rule of public international law that the expropriation of foreign nationals must not (save in certain defined exceptional cases) take place without adequate compensation, and yet, at the same time, it may, by its own national law, deny adequate compensation in a specific case not covered by the exceptions to the rules of public international law requiring compensation.

Further, it is submitted that to say that expropriation occurs *only* when one who is full legal owner by the *lex situs*, loses his property by that law, is to oversimplify the problem of expropriation; it is equally unsatisfactory to say that the seizure or denial of interests less than full legal ownership by the *lex situs* of a thing are not examples of expropriation.

Both classical Roman Law and the developed Anglo-American Law, do in fact recognize the possibility of splitting up ownership in the same object of property, i.e., having a legal and a less than legal owner, of the same thing at the same time.

Dr. Vera Bolgár has reminded us that classical Roman Law recognized the "duplicity of ownership in the *dos*, and the *peculium castrense* within the property of the paterfamilias": that later Roman Law used the term *possessio* and *dominium* indifferently to describe legal ownership *or* factual control; "*either* might mean ownership or a *jus in re aliena*, as well as actual enjoyment." She further points out that a distinction was made by the glossators between *dominium directum* and *dominum utile*, which certainly resembles the duality of legal and equitable ownership of common-law countries. In English real property law, the doctrine of estates indicates the possibility of a multiplicity of coexisting interests in the same land and at the same time.[8] Indeed, in England, the feudal doctrine that all estates were held mediately or immediately from the Crown by various forms of tenure, recognized a splitting of ownership, and incidentally limited the overlord's claim to escheat or forfeiture to the estate held by his vassal.

To those trained in the institutions of Roman law or of the common law and equity, there is no difficulty in accepting the fact that "ownership" in an object of property may be split up contemporaneously, that a legal and a beneficial or equitable "ownership" in the same property may subsist at the same time.[9] This fact, it is submitted, is of great importance in relation to expropriation, since in the diplomatic sphere, governments commonly recognize and protect their own interests and their subjects' interests that are less than complete and absolute ownership by the *lex situs*. The recognition of the *dédoublement de propriété*, or splitting up of ownership, is indeed essential in modern public and private international law if valuable interests *are* to be protected even though the *lex situs* may not recognize them.

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[8] "Why No Trusts in the Civil Law?" 2 American Journal of Comparative Law (1953) 204, 206.

[9] Lee, Jurisprudence of Holland, 1921, 85, 223, 247. Dr. Bolgár points out too, that Grotius was fully aware of this splitting up of ownership.

A few examples may make this clear. The interests of a beneficiary or equitable owner in a trust property situated abroad may need to be protected by English court proceedings directed against the trustee who is within the jurisdiction, and whose conscience is affected by the trust he has accepted: it will be by no means always a defence to him to say that by the *lex situs* of the property he is the sole legal owner and that the *situs* does not recognize trusts.[10] The beneficial owner under a trust may not be recognized by the *lex situs*, but his status and interest in the trust property may be protected by the English court whenever it can make its decree effective; this it may do by compelling the defendant legal owner affected by the trust to execute an assurance, valid by the *lex situs*, to those entitled to the trust property when the trust comes to an end; or by compelling the defendant trustee to pay damages by way of compensation for breach of trust; for a breach of trust is the ignoring of the claims of the equitable "owners." So too, when an owner entitled to Blackacre by virtue of a foreign law of intestacy, of prescription, or expropriation of *the situs*, is compelled to elect for or against the will of a person dying domiciled in England and valid by English law disposing of Blackacre, the owner can retain rights under the *lex situs* of property, but, if he does so, the English court may put him to his election[11] for or against an English will purporting to give the property to X, a person not entitled to it by the *lex situs*.[12]

If by the foreign law of expropriation of State X, B is expropriated, and the sole legal ownership of property situated in State X is vested in T, the court of equity could put T to his election to retransfer the property to B the former owner to whom the testator has willed that property, if T wishes to benefit under that will. An English court will not attempt to insist upon a transfer that cannot lawfully be made by the

[10] Penn v. Lord Baltimore (1750) 1 Ves. Sen. 444, 27 Eng. Rep 1132; Ewing v. Orr Ewing (1883) 9 A.C. 34; Jenney v. Mackintosh (1886) 33 Ch. D. 595. The assumption of jurisdiction in these cases has been criticized by Falconbridge, Conflict of Laws (2nd ed. Toronto 1954) p. 616, and indeed the cases seem to have dealt with land within the British Commonwealth, but there is no reason why English courts should not continue also to recognize equitable obligations in relation to *foreign land*.

[11] A similar doctrine exists in Scots law, as "Approbate and Reprobate."

[12] In re Ogilvie [1918] 1 Ch. 492 at p. 502 Younger J. said:

"This Court does not, in these cases of election, against a foreign heir, presume to sit in judgment upon the wisdom or the reverse according to its own notions of the municipal law of the country. If it finds that an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, and has, in fact, so far as words are concerned, effectually so disposed of it, this Court merely says that it is against conscience that that foreign heir, given a legacy by the same will, and to that extent an object of mere bounty on the part of the testator, shall take and keep, under the protection of the foreign law, the land by the will destined for another, without making to that other out of his English legacy, so far as it will go, compensation for his disappointment, thus effectuating the testator's whole intentions."

foreign *lex situs*,[13] but it may nevertheless prevent a legatee from approbating and reprobating the terms of a will, once it will endeavor to make good equitable claims.

Expropriation by the *lex situs* may result in the loss of legal ownership in the *situs*; but it does not necessarily dispose of claims of equitable owners to compensation for loss of an interest that can be protected by a court of equity; nor does it mean that a legal owner who has received compensation for expropriation can, in equity, ignore the claims of beneficiaries under a trust affecting that compensation.

It is true that the refusal to treat ownership as divisible[14] is not uncommon in Continental countries, and this may account for a reluctance there to use the term expropriation to cover the acquisition by a State of rights that are less than full legal ownership by the *lex situs*,[15] or to embrace taking a right from one who is not full legal owner by the *lex situs*; though Layer admits that problems raised by expropriation and the limitation of rights cannot be treated separately,[16] and Wharton[17] and Kruse[18] use the term expropriation to cover a *partial* deprivation of property.

The notion that the *lex situs* can be effectively supreme for the purposes of settling the disposition of property in the territory of the state, as Dr. Lalive has recently and persuasively shown, does not settle the ultimate disposition of "interests" in a movable object of property, e.g., a chattel;[19] moreover, the effectiveness of the *lex situs* is often only temporary, for example where an object is moved to another *situs*, the new *lex situs* will have the last word on the question of effective control, and equally where the *lex situs* of land or of chattels changes, by reason of the incorporation of the land and the chattels therein in the territory of a new state with a different legal system, the interests in the property that

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[13] Brown v. Gregson [1920] A.C. (Sc.) 860 at p. 877. Lord Cave dissenting in this case (p. 883) was of opinion that nothing in Argentine law prevented the holder of land in the Argentine from selling his land to fulfil an equitable obligation. The decision turns upon a question of fact, i.e., whether Argentine law allowed the Argentine beneficiaries to elect freely; it is not therefore binding on this point, Lazard Bros. v. Midland Bank [1933] A.C. 289.

[14] *Cf.* Kahn-Freund in Renner, Institutions of Private Law (London, 1949). Cohn (Vol. 1, Manual of German Law (1950) 117) states: "In German law there is no room for the distinction made in English law between legal and beneficial ownership."

[15] Though the term is used to include this in Spanish; see Expropriación in "Enciclopedea Universal Illustrada."

[16] Principien des Enteignungsrechtes (1902) 12.

[17] The Crown is the feudal overlord or dominus from whom estates are held. Law Lexicon (1924). See Cheshire: Modern Real Property (7th ed. 1955) 13, 32.

[18] Vinding Kruse, The Right of Property (1939) 371.

[19] The Transfer of Chattels in Private International Law (Oxford, 1955) 58 *et seq.*, and 99 for conclusions.

can be protected may also be changed. A change in a legal system may effect a change in the nature and quality of the protection afforded to property by the *lex situs*; it does not necessarily affect the claims of equitable owners or of those who are regarded as owners under other systems of law than the *lex situs*. The most that can be said is that the *lex situs* has for the time being the most effective control over an object of property.

B. Public International Law Remedies

Modern international practice relating to compensation and restitution clearly admits of wide definition of property or of a protectable interest.[20] Article 78 (9) (c) of the Peace Treaty with Italy is typical:

"Property means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as *all rights or interests of any kind* in property . . ."

For the purposes of expropriation in its international aspects, it is best to think of property as a "thing," but not solely as a *material* or tangible thing (for what indeed is material in a world of commerce that deals with electricity, wireless waves, radioactive emanations, and cosmic rays?), but as a "thing" in the sense adopted by Pollock, i.e., "some possible matter of rights and duties conceived as a whole and apart from all others."[21] In modern Anglo-American legal thinking, "things" which are the objects of ownership also include all varieties of rights and claims that can be lawfully transferred, or disposed of, or for that matter expropriated. Thus, under the term "property," are included choses in action i.e., stocks, shares, bills of exchange, cheques, promissory notes, deben-

[20] In the award by the Permanent Court of Arbitration on 13th October 1922 in the dispute between the U.S.A. and Norway the court said:

"It is common ground that the word 'property' in the Fifth Amendment of the U. S. Constitution, is treated as a word of most general import, and that it is liberally construed and includes every so-called interest in the thing taken . . . in some other systems of law the notions derived from the 'proprietas,' as propriété, are equivalent to ownership, the word property in the U. S. Constitution, as in the English and American Common Law system, includes all kinds of 'personal property,' all *jura in personam*, and choses in action" and again "just compensation is due to the claimants under the municipal law of the U.S., as well under the international law, based on the respect for private property." 17 American Journal of International Law (1923) 362 at 386 and 388.

Again in section 15 of the British Enemy Property Act 1953:

"In this Act, unless the context otherwise requires, the expression 'property' means real or personal property, and includes any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, and any other right or interest whether in possession or not . . ."

[21] First Book of Jurisprudence (6th ed. 1929) 130.

tures, copyrights, patents and concessions, and also debts which amount to little more than rights or claims to sue, as well as contingent and defeasible interests which may never mature, but which are saleable or mortgageable; also treated as property are beneficial interests in trust funds which may be defeated by a conveyance of a legal estate to a *bona fide* purchaser for value; there is no limit to the varieties of things which man's ingenuity can treat as property.[22]

The French Civil Code also possessed a wide notion of the objects of ownership. In articles 517 and 527, and in the explanatory articles which follow each of those articles, the definition and classification of things for legal purposes is based either upon what is thought to be their physical nature, or upon some classification of the law itself. Thus "immovables" include servitudes and real actions (article 526), and "movables" include "choses in action," as in English law.

A theoretical cleavage comes with the German Civil Code, which, in defining the general principles of *Sachen*, states that "things, in the sense of the law, are material objects only."[23] True, for many purposes it is necessary to distinguish between corporeal and incorporeal things, for corporeal things can be the subject of physical recaption in a way that incorporeal things can not, and moreover if the notion of incorporeal things is extended to cover all claims of whatever sort, the notion of property, as Paton says,[24] becomes meaningless; it may, for example, include claims for personal injury, insult or defamation. However, for the practical purposes of considering problems arising out of expropriation, it is best to reject the limited German view of "things," and to accept one which, although it does not include claims for *personal* injuries, i.e., claims that could not involve the restitution of an object of property, does include those incorporeal rights that are commonly the subject of restitution and which are bought and sold, and seized by States, and in respect of which rival claims arise. If a corporeal or incorporeal "thing" can be considered as an "entity," a claimant may allege that, although he has been expropriated of it, it still continues as an entity, despite the change in ownership alleged to have been effected. An incorporeal patent, or a debt, no less than a corporeal chattel, may thus be expropriated—but still thought of as a continuing entity for the purposes of restoration or compensation.

The claimant in respect of an expropriation then, claims for the loss of a "thing," i.e., for a loss of property in a general sense; and the fact that

[22] See Paton, Jurisprudence (2nd ed. 1951) 419 *et seq.*

[23] Kocourek: Jural Relations (1927) 307; Manual of German Law, Vol. 1 (1950) 116.

[24] Jurisprudence, *op. cit.*, 408.

his "property" or "thing" cannot be recovered in the courts of the place of the expropriation does not necessarily mean he cannot claim that thing in another jurisdiction. In the international legal order, a state is always able to protest in respect of any loss or threatened loss to its own or its subjects' property, and diplomatic claims are often made in respect of claims that are *not legal rights* by the *lex situs*. For example, Article 1 of the U.K.—Czechoslovak Agreement for compensation for expropriated properties of 28th September 1949 refers to:[25]

"All property, rights and interests affected by the various Czechoslovak measures . . . owned directly or indirectly, in whole or in part, and whether legally or beneficially, by British Nationals . . ."

The words "*directly or indirectly*" and "*legally or beneficially*" are significant: they show that interests less than complete ownership by the *lex situs* are protected by the Agreement. This is made clear by section B of the Foreign Compensation (Czechoslovakia) Order in Council 1950 No. 1191:

"13. (a) In this order the expression 'property' means property of any kind, movable or immovable, whether owned or held directly or through a trustee or nominee

"(b) If application under this Order is made by a trustee and by a beneficiary in relation to the same claim, the Commission shall entertain the application made by the trustee in preference to that made by the beneficiary, and, if the claim is established by the trustee to the satisfaction of the Commission, shall dismiss the application made by the beneficiary; but, if the claim is not established by the trustee because he is not a qualified person under Article 7 of this Order, the Commission may entertain the application made by the beneficiary."

By section 13 (b), when the trustee can claim, he must; when he cannot, e.g., because he is not entitled to British diplomatic protection, the beneficiary, if British, will be allowed to do so, and his equitable ownership will be recognized. The recognition for international purposes of a form of ownership that is not ownership by the lex situs, is made even more clear by Article 2 of the U. K.—Czechoslovak Agreement, which refers

"To the claim of a British national . . . notwithstanding the fact that the restitution or recognition of his title to the property by the Czechoslovak authorities has not taken place."

Moreover it is quite common for diplomatic assistance to be given to shareholders by the state of their nationality, to safeguard their ultimate

[25] Cmd. 7797/49.

interests in the assets of a company that has been expropriated by its foreign *lex incorporationis*.[26]

There is no doubt that the splitting up of the interests of the corporation and corporators, in the corporate assets, is also an essential part of the diplomatic protection of shareholders today. The shareholders may not own the assets of the company in which they have shares, and they may have been "forcibly incorporated" by the *lex situs*, but the government of the shareholders may still protect their interests *as shareholders* in the assets of the company against the acts of the government of the *situs* of those assets.

It is true that in such cases the legal ownership of the company's assets is, by the *lex situs*, in the company, for the *lex situs* of the assets is also the *lex incorporationis* of the company; but the benefit from the exploitation of those assets is in the shareholders who may be foreign nationals. The expropriation of the company may leave the company, the collectivity, without a remedy, since a government may not wish to take up the claim of a *company* incorporated by the law of the foreign incorporating state, in respect of assets within that state's territory. It might, however, take up such claim where the company, though incorporated abroad, has its real seat in the territory of the claimant state. But, let it be emphasized, a foreign government may always recognize that the shares in the company owned by its nationals represent interests that are protectable,[27] even though the shareholders may only be entitled to realize their shares in the company's assets after a formal liquidation of the company.

III. OWNERSHIP, SOVEREIGNTY, AND EXPROPRIATION

Much confusion has arisen, it is thought, from the 19th Century exaggerations of the powers of the territorial sovereign over persons and things in its territory. Some theorists pushed the notion of sovereignty so far as to deny supranational obligations not based on treaties, and tended to deny or minimize the claims of international custom. It has been rightly said that:

"Everything actually in the territory of the state, considered in itself and independently of the persons to whom it belongs, must be deemed subject to the right of imperium of the territorial sovereign."[28]

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[26] For the history, see Mervyn Jones, "Claims on behalf of Nationals who are Shareholders in Foreign Companies," 26 British Y. B. of International Law 1949, p. 225.

[27] *Cf.* Foreign Compensation (Czechoslovakia) Order in Council 1950. S.I. No. 1191, article 14.

[28] Fiore, International Law Codified (1918) Rule 291, at p. 187.

But imperium, sovereignty, and eminent domain are *not* ownership: territorial sovereignty exists in the framework of international law, it is not superior to it. By international custom, a state is certainly master of its own territory, but territorial sovereignty is not the same thing as ownership; though the exercise of sovereign power may restore a thing to its owner. Because a sovereign state may control and expropriate property in its territory, this does not mean that it can, at will, disregard the claims made, by virtue of public international law, to restitution, or to just compensation, or that it may always insist on its own conception of private international law. The denial that the institution of property is and always has been part of the *jus gentium*, is usually to be found among those writers who either deny the binding force of international law, or who consider that in a clash of interests between a state and an individual state interests are *always* supreme.

In its extreme form, the notion of eminent domain whereby a state may seize property for public purposes under its own law, confuses sovereignty with ownership, and tends to see the sovereign, not as an institution for the *protection* of subjects' rights within the rule of law, but as the real owner of those rights which, for such reasons as it thinks fit, it may concede or withdraw at will by virtue of its sovereignty. This was John Austin's view,[29] a view not generally accepted by English international lawyers. For Austin, the sovereign was *legibus solutus*,[30] and might lawfully enjoy property which it could control, on such terms as it desired. It is not, therefore, surprising that Austin attempted to pour scorn upon "natural law and *jus gentium*, which give rights independently of the state, and superior to any which the state could impart."[31] In Austin's totalitarian theory, there were no legal rights or claims outside the state; he closed his eyes to the fact that, historically, claims to property arise, and are recognized, from a sense of justice and fair-dealing among individuals and groups, doing business together, and not solely from some actual or fictitious concession by a state. To say, as Austin did, that "the state has a *right* to all things within its territory . . . (or is the absolute owner of all things within its territory) . . . it is not restrained by positive law from using or dealing with them as it may please,"[32] is to adopt the *concession* theory to explain all legal rights and claims in its extreme form, and to assume, quite unhistorically, that every right owes its existence (not its protection) to a particular sov-

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[29] Lectures on Jurisprudence, Vol. 2 (5th ed. 1885) p. 839 *et seq.*
[30] *Op. cit.*, at 841.
[31] *Op. cit.*, at 842.
[32] *Op. cit.*, at 841.

ereign, and not to those considerations of fair dealing which govern the daily economic life of men in their national and international relations. Concessions of a freely revocable character may be created by a sovereign, but they are very special cases and by no means typical of property rights.

A sovereign certainly regulates property in its territory and under its effective control and may regulate it differently in different parts of the dominions;[33] a sovereign may protect, by diplomatic and other action, property situated abroad, but in order to explain this, one does not need to accept extravagant claims by theorists who regard the sovereign of the *situs* for the time being of a thing as the *fons et origo* of all rights.

Most international lawyers *do* differentiate between a sovereign's ownership and sovereignty. Even on conquering territory, a sovereign is presumed to leave intact property rights of defeated enemies, and of friends or neutrals therein; the sovereign succeeds *as owner* only to state property, and to that *cum onere*, by way of state succession; anything else the sovereign wishes to take will require legislation on expropriation,[34] and this legislation may be the subject of international representations by foreign states affected by it. To confuse sovereignty with ownership is to revert to ideas of extreme feudalism, where as Pollock and Maitland said:[35]

"Jurisdiction is property, office is property, the kingship itself is property: the same word *dominium* has to stand now for ownership and now for Lordship."

[33] The relation of a sovereign was, it is suggested, put in its classical form by Pufendorff:

"The first right consists in this, that the rulers can prescribe laws for the citizens, with regard to the use of their property, in conformity with the interest of the state, or concerning the amount and quality of their possessions, as also the method of transfer to others, and other matters of the kind.

"The second right consists in this, that the ruler can take away a small part of their property, under the name of tribute or taxes. For since the life and fortunes of the citizens must be defended by the state, the citizens must contribute the means from which the expenses necessary to that end may be met. Hence he is very shameless who wishes to enjoy the protection and advantage of the state, and yet to contribute no services or property to its maintenance. And yet in this matter, wise rulers with good reason adapt themselves to the querulous nature of the crowd, and endeavor to bring about the collection of taxes as imperceptibly as possible, especially by observing equality, and by exacting moderate and assorted taxes, rather than large and uniform ones.

"The third right is that of eminent domain, consisting in this, that, when urgent necessity of the state demands, any subject's property which the immediate situation especially requires, can be seized and applied to public purposes, even if the property far exceeds the proportion which he was bound to contribute to the expenses of the state. But for this reason the excess ought to be refunded to that citizen from the public treasury, or by contribution of the other citizens, so far as possible."

De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo, Vol. 2 (Carnegie Endowment Translation, 1927) Ch. XV, p. 136.

[34] See O'Connell, Law of State Succession (1956) 213, for a full survey of the authorities.

[35] History of English Law (2nd ed. 1898) vol. 1, p. 230.

Such an obsolete attitude is not even shared by Marxist theory which only proposes to deny private ownership in whatever are deemed to be the "means of production" for the time being. To regard all rights and claims as created by the state, because they may be protected by it, is a *non sequitur*, and it is to deny the facts of economic life in a relatively free economy in which property can be created and transferred within a system of law, by individuals and groups, and not solely by the state under whose protection the transaction takes place. It would be a confusing and unnecessary fiction to say that whenever a new house or a ship is built, it really belongs to the state in whose territory it has been created. The owner of property in a civilized state expects to be protected by the state and only exceptionally to lose his property to the state. To say that the state is the owner of all property, and that exceptionally individuals may continue in their enjoyment of things they have created, bought, or received by way of gift, at home or abroad, is to strike at the root of mutual confidence in business and to reject the economic order of most of the modern world which recognizes that many "things" do not originate in state activity, but in transactions depending upon the wills of those persons or entities concerned, i.e., in those transactions which the state normally protects in the interest of justice, order, and fair dealings. In those exceptional cases where a state *does* expropriate by the classical form of expropriation against adequate and prior compensation, by requisition, or by nationalization against adequate compensation, it frankly recognizes that fact by certain special formalities, whereby the protection of the sovereign is withdrawn from the former owner, and assured to the expropriating body.

International tribunals which apply public international law do in fact deal with claims arising out of the individual ownership of property, as Lipstein has shown,[36] and they do not consider that the existence or nonexistence of the right of a person to sue by the *lex situs* is conclusive for the purposes of the rules applied by international tribunals. Lipstein appears neatly to sum up the numerous decisions he quotes from international courts and arbitral tribunals when he says:

> "Municipal law determines whether a property right has been acquired and whether it is vested in the claimant. International law must decide whether the defendant state is liable for the violation of a property right so acquired, whether the claimant state is entitled to maintain the action in an international court and finally it must determine the measure of damages."[37]

[36] "Conflict of Laws before International Tribunals," 27 Transactions of the Grotius Society (1942) 142 and 29 (1944) 51.

[37] *Op. cit.*, 61.

Expropriation by the *lex situs* gives a title by the *lex situs*. It may still leave the expropriated owner with a claim to restitution or compensation which may be recognized by tribunals or states applying public international law; it may even leave him with a claim available according to some system of municipal law other than that of the *situs* of expropriation. To put the matter another way, the legal title by the municipal law of the *situs* may nevertheless be subject to enforceable claims in much the same way as a legal owner may be compelled to recognize a trust for the benefit of an equitable owner; when for example the equitable owner is of full age and solely entitled to benefit, the equitable owner may, by proceedings *in personam* directed against the trustee when he comes within the jurisdiction of a court of equity, compel the trustee to hand over the trust property to him or, when that is not physically possible, or not legally possible by virtue of the foreign *lex situs*, then the beneficiary may obtain damages for breach of trust in order to prevent a trustee within the jurisdiction from personally benefitting by a deliberate breach of trust.

It may be said that the analogy between a state benefiting from expropriation without payment of compensation and a trustee benefiting from his trust, is not exact, since the title taken by a state by expropriation is in accordance with its own *lex situs*; but even sovereign states may indulge in what, in the eyes of international law, are acts of unjustified enrichment; indeed the Nazis were even guilty of blackmail; and because a sovereign state may "legalize" its own acts and prevent a remedy in its own courts, it does not thereby prevent courts of other sovereign states from granting remedies, when they can properly do so, to compel restitution to the dispossessed, nor does it stop them from making representations based on claims to property which they consider to remain in existence, outside the *lex situs*. This point of course requires considerable elaboration. Let it be said at once, not every expropriation is an unjustified enrichment in the eyes of other states. But the possibility of a demand for restitution must be faced by any expropriating state, since no state is ruler of the world and at best its powers are territorially limited. The facts that some states tend to accept a title acquired by the *lex situs* as unimpeachable in their courts, and that they hesitate to take up the claims of the dispossessed, do not alter the foregoing analysis of the judicial situation resulting from expropriation, for sovereign states, like individuals, will occasionally decide not to press a claim for which sound arguments can be found.

What indeed does the state acquire by its act of expropriation? Simply a title by its own *national* law that other states may not recognize if

they think that the title has been acquired in a manner not recognized by *international* law. Indeed, to recognize a title so acquired might itself be a breach of international law. Taking this limited view of title acquired by expropriation *in invito* the owner, the other view taken by writers like Torsten Gihl,[38] that public international law is only concerned with seeing that in proper cases an indemnity is paid to the owner, is not acceptable; this view ignores the many cases in which restitution is properly claimable and postulates that what is acquired by state legislation on expropriation is an international title that other states must recognize, and not a national title that other states may review in the light of international law. There is, it will be submitted, no universal rule of public or private international law that makes it obligatory, in all cases, for a title acquired by a territorial law of necessity to be recognized by other states within their own jurisdiction: certainly, until a title acquired by expropriation be called in question, it will be presumed to have been lawfully acquired by the state law applicable, and the acquisition will also be presumed to have been acquired in accordance with international law, but such presumptions may be rebutted. While Gihl is right in saying that "anyone who purchases goods in a foreign country from its government, or from a state authority, or a state-owned agency such as the National Iranian Oil Company, should be justified in presuming that the vendor is entitled to dispose of the goods,"[39] this is only a presumption, for a title cannot stand if it contravenes the rules of international law as understood in another jurisdiction. Any contravention of international law is an objective matter, and it can be objectively discussed. Facility in trading in expropriated property is no reason for ignoring rules of international law. Even a writer who is relatively favorable to the recognition of sales by a state of expropriated property, like Seidl-Hohenveldern,[40] is careful to stress that he is dealing with legal questions of private international law and not with political or ethical problems; but public international law does have certain ethical content, it is a body of rules which, like the rules of equity, may be used to see if a state has acted up to the minimum standard of conduct it attempts to lay down for states. If the principles enshrined in public international law are to be upheld by private international law, and if private international law is not to contravene public international law,

[38] Liber Amicorum to Algot Bagge (Stockholm 1956) 67.

[39] *Ibid.*, 65. Warnings by dispossessed owners or their states may serve to make this presumption less easy to maintain. See State Department's warning on Persian Oil, Manchester Guardian 7 Dec. 1952.

[40] Internationales Konfiskations- und Enteignungsrecht (Tübingen, 1952) 3 and 4.

no solution of a problem of expropriation by a national tribunal should violate the principles of public international law; if it does, the state affected by the violation, may use its own rules of private international law to redress the balance or may, alternatively, take appropriate steps in public international law to restore the owner to his rights.

In fact legal history, as well as modern anthropological investigations, have shown that the conception of property existed before the organization of the modern state, and before conceptions of state sovereignty. One of the historic missions of the *jus gentium* and one of the missions of international law today is still, it is submitted, to give some protection to contractual and other claims to objects of property; to advance claims acquired bona fide by states or individuals, is not the same thing as to create them. Failure by one state to recognize or to protect a claim to property is not necessarily fatal to it: other states may take different views, and afford measures of protection under their systems of law, or by virtue of procedures of international law. *When a state uses a procedure of international law to obtain specific restitution or adequate compensation for something expropriated by a foreign state, it may be said to be recognizing and protecting a claim to property that exists under the law of nations.* This, in the present writer's view, is the proper and traditional basis of diplomatic protests against arbitrary seizures or threats of seizure, and of claims for restitution or for adequate compensation on expropriation.

It is thus theoretically and practically possible to use the conception of "*dédoublement de propriété*" or splitting up of ownership, not only in national law but also public and private international law. National law may take a limited and exclusive view of the legal rights over a thing; nevertheless, for international purposes, claims over it may be pressed as meriting the restitution of the thing seized, or at least as worthy of full compensation.

There is nothing very extraordinary about this coexistence of different claims to the same object of property. It is a familiar situation in private law and in private international law, when the same "thing," for example, may have been sold by a fraudulent vendor to each of two separate claimants each of whom bases his claim on a different contract grounded in a different proper law. For example, a motor car or a patent may have been sold first to A by "French contract," and then to B by a "Dutch contract." If the motor car is locally situated in England, or the patent registered there, the *lex situs* may well decide the competing claims to enjoyment. Though public international law will decide the extent of the situs, i.e., whether the car is or is not in the territorial unit known as England, so too, when State A claims by virtue of its legislation on ex-

propriation, to have acquired a title to a chattel in State C, and State B denies that its subject O has lost his claim to it, the *lex situs* of C, may well claim effective control, and international law will decide whether the *lex situs* complies with international law in so doing. If it does not so comply, then O may move for diplomatic assistance.

National courts usually try to keep their legal systems, as far as possible, in harmony with public international law, since the disregard of public international law by a national tribunal may well give rise to diplomatic reclamations involving state responsibility and may even result in retorsion or reprisals. Public international law is thus more than a "branch of national law," and it is more than "public policy."

Irresponsible and capricious confiscations, and expropriation without adequate compensation, are important factors in the failure of capital to flow from rich to poor countries in recent times. A study of expropriation in international economic arrangements is, therefore, of value in two ways, first, it may resolve the problems of salvaging something for legitimate creditors faced with serious loss, and second, it may serve to indicate what is required if the confidence of investors and foreign owners of property is to be restored.

JOSEPH DAINOW

Civil Code Revision in the Netherlands: the Fifty Questions

AMONG THE MOST NOTEWORTHY of the recent programs of civil code revision is that of The Netherlands. Two of the most striking features of this program are (1) the confidence which the country placed in one person to do the job and (2) the close working interest of the government and the legislature.

The first point is generally well-known, as Professor E. M. Meijers of the University of Leyden had a world-wide reputation and was universally recognized as one of the outstanding legal scholars of Europe. When he received the civil code revision assignment in 1947, he was relieved of all other duties, and he was devoting himself entirely to this project when he was unexpectedly taken by death in 1954. By that time he had nearly completed his innumerable conferences with the advisory commissions, governmental and economic organizations, members of the legal profession, and private groups. There had been published the first parts (Books I–IV) of a proposed draft[1] and commentary;[2] the remainder of the text was in tentative form; the balance of the commentary was being prepared. The commission of three men (triumvirate)

JOSEPH DAINOW is Professor of Law, Louisiana State University. Much of the information and material for this article was obtained through personal conferences and discussions in the Netherlands when the writer was there as a Guggenheim Fellow in 1954. Acknowledgment is made of the assistance of Jan Schoffeln, as research assistant at Louisiana State University Law School, in connection with the translation and use of the original materials in the Dutch language. Acknowledgment is also made to Mr. P. Eijssen, Advisor to the Minister of Justice of the Netherlands, for his kindness in reading the manuscript and for his comments and suggestions particularly with reference to the translation of the Questions and Answers as well as their procedural significance. Mr. Edward V. Saher, Chairman of the Netherlands Law Foundation, very kindly read the manuscript and made a number of appreciable suggestions.

Some terms and concepts have no exact parallel or equivalent in Anglo-American legal usage. Only a few are here explained, others will be discussed elsewhere in connection with the substantive matters involved in those situations.

[1] Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Tekst, eerste gedeelte Boek 1–4 ('s-Gravenhage 1954).

[2] Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting, eerste gedeelte Boek 1–4 ('s-Gravenhage 1954).

who were appointed to complete the task has published the text[3] and commentary[4] of Book V, and the concluding parts are expected to follow.

The second matter is much less known and is the one to which this article is principally addressed, namely, the close working interest of the government and the legislature. The Minister of Justice was (until his untimely death in 1955) an absorbed and pressing taskmaster on the project; he and Professor Meijers presented the "fifty questions" to the legislature for the determination of certain policy decisions. These instructions then served as the basis for the textual implementation of the code.

In the course of his initial research and conferences,[5] Professor Meijers sought the opinions of experts and interested parties by obtaining written replies to specific questions from those who had indicated a willingness to answer. These questions covered a number of areas, such as property and contracts and administration; they were so directed as to elicit information about existing practices and opinions about future needs in the light of developing conditions. Illustrative of these questions were the following: (1) has it appeared in practice that the present system for the recordation of deeds has any serious shortcomings, and if so, what are they? Should the system be altered in basic principle, or only corrected, and if so, in what respect? (2) Should the legal regulation of the longterm lease and building lease be altered with a view to town-building, and if so, in what respect? (3) Is it desirable to make any changes in the rules governing accretion? or (4) usufruct, especially with reference to the usufructuary's powers of disposition or investment, the protection for the rights of the naked owner, and so forth? (5) Should the law give people an opportunity to place their property in administration for their own benefit (e.g., by a fiduciary transfer)?

Detailed replies were received from several courts and law faculties, banks, insurance companies, the organized attorneys and notaries, national and municipal governmental bodies and committees, and many others. The information and suggestions were very helpful and gave Professor Meijers a thorough insight into the practices and the predilections of the whole country. However, there also appeared a substantial number of important differences not only in the practice but especially in the opinions and recommendations.

[3] Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Tekst, tweede gedeelte Boek 5, completed by Drion, Eggens and de Jong ('s-Gravenhage 1955).

[4] Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting, tweede gedeelte Boek 5, completed by Drion, Eggens and de Jong ('s-Gravenhage 1955).

[5] Some of this information is found in Meijers' Report to the Queen (Aan de Koningin), in Ontwerp voor een Nieuw Burgerlijk Wetboek, Tekst, eerste gedeelte, at pages III–VII.

One change in technique and procedure which was adopted as a result of this experience was to shift from full and lengthy discussions in the government advisory committee with whom Professor Meijers consulted on all matters (and of which he was chairman), to preliminary discussions of a more concentrated nature with a series of separate small committees composed particularly of specialists in the fields concerned. These committees included not only members of the general advisory group but also representatives from industry and experts from practice. Professor Meijers worked separately with each committee; preliminary drafts were discussed and revised continuously. This procedure worked very well for dealing with the various special contracts, intellectual rights (produce of the mind), the right of name and abode, curatorship, the right of free association (including co-operatives and mutual insurance companies), liens and mortgages and the transfer of immovables, life insurance and annuities, corporations, employment contracts, and so forth. In each case, experts were invited from appropriate sources, including government representatives, banks, chambers of commerce, labor unions, administrative agencies, publishers, hotels, tourist bureaus, building contractors, and the like.

In all of this, Professor Meijers found a substantial number of important issues on which the existing law, the jurisprudence (decided cases), the practice, and the recommendations as to future needs, were not in sufficient harmony to permit the formulation of appropriate code provisions.

More particularly (for this article) these inquiries and replies, and the discussions, led to the plan—presumably formulated by Professor Meijers and the Minister of Justice—to submit the most important of the issues to the legislature[6] for the expression of its conclusions as to the policies which should be followed. The compilation of these general issues constituted the "fifty questions."

This procedure of preliminary questions to the legislature was not

[6] The legislative power of the Netherlands rests conjointly in the King (or Queen) and the States-General (parliament). In the constitutional sense, the King acts only in conformity with the head of a Department (Minister) and through him. The States-General consists of two bodies, the Upper or First Chamber and the Lower or Second Chamber. The former had 50 members elected for six years by the eleven Provincial States (local governments of the provinces) with one-half changing every three years. The latter had 100 members elected directly by universal suffrage for four-year terms and changing en bloc. This Second Chamber may be considered as corresponding roughly to the House of Commons of the English Parliament or the House of Representatives of the American Congress. Netherlands Constitution, Arts. 55, 56 and 79. See also Encyclopaedia Britannica, V° Holland.

An increase of the number of both Chambers (75 instead of 50, and 150 instead of 100) was adopted in 1956.

unanimously accepted. There were some who preferred to have Professor Meijers complete his draft code and submit it as a whole to the legislature. These did not believe that the question procedure would accelerate the achievement of the project, and they felt further that the solutions for many situations are to be found not so much in general principles as in detailed implementation for more specific problems. Thus, after having proclaimed a general policy decision, the legislature might find itself in disagreement with some of the more particular rules developed under it. However, this position—that it was not the answers to merely general questions but the full text of the draft which counted—did not prevail. The majority felt that the publicity incident to the question procedure would evoke discussions as well as objections and desires, all of which it would be well to draw out sooner rather than later, in order to have the early benefit of constructive suggestions and at the same time to meet the critics in the open. Most of all, it was likely that the legislature (Second Chamber) would act favorably and more quickly in the final adoption of a code if it was based on policies and principles of which it had already expressed approval. And even if there should develop some few changes and differences, there would be conformity to the enunciated policies for all the other matters; it was successfully argued that there would be a tremendous gain in any event.

Another obstacle developed in determining how to handle the matter procedurally in the Second Chamber because it was not an ordinary "government document," nor was it a regular "proposal of law." This technicality was hurdled by recognizing that as a piece of business it was *sui juris* and that it could be processed in the same manner as a proposal of law with few adjustments.

This preliminary question procedure was not altogether novel for the Netherlands because a precedent existed in the history of the existing Civil Code which was prepared during the 1820's and promulgated in 1838. Furthermore, the full significance of such a procedure at this time is more clearly seen and emphasized by contrast with the attitude and position of the government of France in connection with the civil code reform program that is currently in progress there. Dean L. Julliot de la Morandière, Chairman of the Civil Code Reform Commission of France, made the following statements in his preliminary report[7] which accompanied the presentation of the first part of the tentative draft in 1953.

[7] English translation by Joseph Dainow in 16 Louisiana Law Review (1955) 1.

He explained that the delay in the progress of the project was due not only to their form of organization and methods of procedure but also

"to the importance of the problems presented and to the very attitude of the Government towards these problems.

"... the moral, philosophical, economic and political bases of its rules have to be examined. To what degree do they have to be modified in order to take the social evolution into account?

"... Mr. P.-H. Teitgen, *Garde des Sceaux* [Minister of Justice], who presided over the opening session on June 25, 1945, himself stressed the fact that while a whole group of subjects are independent of political and economic evolution, there are others 'such as the law of property and the law of obligations which call for juridical solutions in keeping with the social and economic situation.'

"Now who is to say what will be the political and social bases of the new Code? This could not be, or it could not be exclusively, the members of the Commission chosen by reason of their technical knowledge. Undoubtedly, they can and they should be advisors to the Government; they can and they should have their own ideas about these serious questions. Relying upon their experience acquired in the course of their professional functions and upon their own ideas, they can offer suggestions, but it is above all the concern of the Government which is responsible for the policy of the country. The Commission risks working in vain if it prepares its draft without taking into account the thought of the ministers who are responsible to the Parliament and to the nation. Mr. Teitgen was very careful to state that in these matters 'the Civil Code Commission needs directives in order to undertake its work.' But he added—and that is the explanation of our caution—'the provisional Government of the Republic itself does not yet know what will be the evolution of the morrow, and for the time being it must strictly refrain from giving directives to the Commission.' And he asked us 'to make an inventory of the matters' while we occupied ourselves with those subjects which were not closely linked to the social and political evolution.

"You can now understand, *Monsieur le Garde des Sceaux*, why we ourselves, in feeling the reticence of the Government, directed our effort to the texts of the Preliminary Book which raised almost entirely questions of a technical order, and to the texts concerning persons and the family....

"In any case, no one is seeking a radical overthrow in these fields as is proposed by certain doctrines in the field of property or of contract. And above all, after the Liberation in 1945, it is the problems of an economic nature which have deeply stirred general opinion. We have seen how many people thought that liberalism had gone bankrupt, that private ownership must in many cases give way to collective forms of appropriation, that the concept of enterprise (*entreprise*) would have to replace the private businessman, and that if freedom of contract did not disappear it would at least lose ground extensively before the principles of controlled economy. Was this fever of socialization to be lasting? If so, the appearance of the Code should be profoundly changed by it; if not, the modifications to be made in the books on property and on contracts should be much less significant.

"This, therefore, is the true explanation of our caution and our lack of haste. Now that a substantial return to liberal principles has been confirmed, the present Government will undoubtedly feel that we have acted wisely."[8]

[8] 16 Louisiana Law Review (1955) 17–19.

The above excerpts are not quoted for the purpose of directing any criticism or compliments to either France or the Netherlands. Each procedure must be examined for the purpose of being understood; the comparison and contrast may serve to emphasize certain characteristics without intending to imply that either might have been done differently if it were to be started over again in the same circumstances which then existed. When a similar project is undertaken in another country, the observation of these experiences may be useful in reaching decisions as to what procedures and techniques would be most suitable in that particular case.

In connection with the "fifty questions," the techniques and the relationships between the participants can be described as follows.[9]

The original selection of these policy questions was made by Professor Meijers, and he formulated them together with an explanation of the problem and the issues involved; for each question, he also proposed a recommendation and gave his reasons. This was considered by the Minister of Justice and by the Cabinet. Then, in consultation with Professor Meijers, certain changes and adjustments were made, and the recommended answers were revised accordingly.

After approval by the Cabinet, the Minister of Justice forwarded the questions together with the explanations, commentary, and recommended answers to the President of the Second Chamber of the States-General (legislature). After the matter was referred to the Permanent Committee on Civil and Criminal Law of the Second Chamber, written and oral consultations took place between this body and the Minister of Justice, who was assisted by Professor Meijers and by Mr. P. Eijssen, Advisor to the Minister. In some instances the Minister of Justice made changes in his proposed answers to the questions, and the Committee made its final report.

The questions, with the Minister's amended answers and the Committee report, were then considered on the floor of the Second Chamber. The Minister of Justice and Professor Meijers explained and defended their position on the respective issues. During these deliberations, a number of amendments were proposed, and some of the answers were changed accordingly in the final voting. The presentation to the Second Chamber, the discussions of the Committee, and the deliberations of the House, all occurred between November 1952 and September 1953.

[9] Meijers, Report to the Queen, cited in note 5, *supra*; also documents compiled as unit No. 2846, Session (Zitting) 1952–53 of the Second Chamber; and Letter dated July 23, 1955, to the author, from Mr. P. Eijssen, Advisor to the Minister of Justice of the Netherlands.

This vote represented the final action; however, it was not conclusive and binding[10] on the Second Chamber and on the Minister; this may easily be understood, as the action did not constitute law and therefore could not be considered as an advance approval and acceptance of the civil code revision. The final draft of the code will have to go through the necessary legislative process for adoption. A new Government and a new Second Chamber would not be bound. However, the issues involved in these policy questions are so general and mostly nonpolitical that the legislative body is almost certain to adhere to the action taken, especially because it represents the current opinion of the legal profession and to a very general extent of the public at large.

The guiding principle of the procedure is that the Government and the Second Chamber should not go back on a decision without an appropriate reason therefor. Consequently, the procedure was intended for a practical purpose, that is, to indicate to Professor Meijers the necessary starting points for framing his draft of a new code and to avoid unnecessary large-scale alterations of the draft.

In the process of implementing the policy decisions on the fifty questions and elaborating the actual texts for the code, Professor Meijers and his successors, and the Minister of Justice, have found it necessary to deviate slightly from two of the answers. In the process of formulating the working details which have to be integrated with all the remainder of the whole project, it is quite conceivable that a few such adjustments may become necessary. Under these circumstances, the rare deviations from minor aspects of the original policy decisions must be considered as being in good faith and, in all probability, perfectly acceptable.

Despite the reservations summed up above, the legislature's willingness to consider the issues, and the interchange of views which this facilitated, did establish sufficiently what the legislative body then regarded as acceptable solutions and what they felt was absolutely unacceptable. As a guide and as a frame of reference, the questions and the final answers represent a very significant phase of the revision program, as well as providing the policy bases which were followed almost completely for the final draft of the Code.

The questions were arranged in four series, with subdivisional groups as follows:

		Question numbers
First series:	Law of Property in General and Real Rights	1–8
Second series:	A. Law of Obligations	9–12
	B. Obligations by Operation of Law	13–18

[10] Second Chamber, Session 1952–53, No. 2846, no. 10, p. 4.

In the final answers, which represent the co-operative and sincere efforts of the redactor (Prof. Meijers), the Minister of Justice and the Cabinet, and the legislature, it may be stated that in most cases the result is the consolidation of the existing jurisprudence (court decisions) and statutes, and the current practices of the people. In several instances, there is proposed a modification of existing law; and in a number of cases it is seen that there is a reinterpretation and extension of existing law to cover new situations. In addition to these consolidations and adjustments, there are several proposals of entirely new law. The substance of some of these matters is being dealt with in other articles.

It is not within the scope of this article to discuss the substance of any of the questions or the substantive issues of law (some of which are being dealt with elsewhere) that were debated in the various stages of the procedure. For present purposes, the text of the questions is set out to show their nature and range, and the final answers indicate the policy instructions which were actually followed.[11]

THE FIFTY QUESTIONS AND FINAL ANSWERS

First Series

Law of Property in General and Real Rights

Question 1. Should the so-called "negative system"[12] for the recordation of property, the transfer or encumbrance of which requires registration in the public records, be maintained?

Answer. It is not desirable to change to an entirely new system of recordation. However, amendments should be introduced to protect the rights of third persons in good faith by entry or transcrip-

[11] Second Chamber, Session 1952–53, No. 2846.

[12] The existing Dutch system of recordation with reference to immovable property is known as the "negative system." Contract alone does not suffice for the acquisition of ownership or other real rights in immovable property; there must also be an appropriate recordation. However, while these rights are thus established as between the parties, the recordation is not conclusive; third persons may not rely with confidence on the public records and they are responsible to investigate the validity of the titles involved (usually through assistance of a notary). Accordingly, the recordation has only a negative effect in the sense that although the recordation is not conclusive there can be no transfer of property rights without it. However, title defects are very rare because transfers must be made through the intermediary of a notary, and every transfer or mortgage must be filed in an official record.

By way of contrast, some countries have the so-called "positive system" under which

tion into the records of specified data relevant to the origin or extinction of rights.

Question 2. Should the conveyance of immovable property by transcription of an act under private signature be preserved?

Answer. As a general rule, an authentic act should be required for the conveyance of immovables. Exceptions to the rules may be permitted.

Question 3. Should transfer of title to property as security[13] be maintained, or should it be replaced by a registered pledge of business or professional assets established by inscription in a register without delivery of possession?

Answer. The rule of Article 1198, par. 2,[14] of the Civil Code should be maintained. In addition, regulation of the transfer of title to property as security is desirable.

Question 4. For the transfer and pledge of nominative (*vorderingen op naam*, of named parties) claims, should notice to the debtor be required for the validity of the transfer or pledge, or should the notice be only a condition for effective enforcement of the claim against the debtor so that it could validly be given even perhaps after the bankruptcy of the transferor or pledgor?

Answer. Provision should be made that institutions which extend business credit subject to pledge of nominative claims should be able to give legally effective notice to the debtor at the time when they proceed to recover the debt, the notice thus being necessary only for the exercise of the right.

Question 5. Should the law of accretion as amended be more specifically defined as respects accretion at the shores of the sea, the (Dutch) shallows, and the great rivers?

Answer. Accretion ends at the high-water mark. It is desirable to provide that accretions intentionally resulting from construction works carried out in bodies of public waters should not benefit the riparian proprietors.

In principle, accretion occurs when areas of ground become dry because of a lowered water level through natural causes.

Question 6. Should there be special provisions regarding commercial enterprises (*handelszaak*)

a. as respects transfer of the enterprise?
b. as respects pledge thereof?
c. as respects continuation of lease and employment contracts in case of change in the person to whom the enterprise belongs?

Answer. There should be provisions relating to the transfer and pledge of commercial enterprises, making it possible to create a registered pledge against the enterprise. In principle, lease and

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the public records are conclusive, and persons may rely unconditionally upon the last entry as reflecting the legal status of the property. Sometimes, this is limited to persons relying in good faith upon the records; sometimes the conclusiveness of the public records enures to the benefit of all persons.

[13] The transfer of movable property to be used as a security is a transaction—developed in actual practice and treated with approval by the Supreme Court of the Netherlands—whereby the debtor can obtain credit on the security of movable property and without delivering possession thereof to the creditor. The traditional security device on movable property is the pledge (Art. 1198, Civil Code of Netherlands) but it requires actual delivery of possession to the creditor. In the case of Hakkers vs. Van Tilburg, N.J. 1929, 1096, W. 12010, the court stated that the rules governing pledge do not prohibit a contract whereby the debtor transfers to the creditor the ownership of movable property as a security with the stipulation that, for the time being, these movables remain in the possession of the debtor; such a contract transfers the legal title of the property.

[14] Art. 1198, par. 2, Civil Code of Netherlands: "The right of pledge cannot exist with reference to things which remain in the possession of the debtor or of the person who is giving the security or which are restored with the consent of the creditor."

employment contracts should pass to the new owner of the enterprise. But an employee should not be under obligation, against his own will, to the person who acquires the enterprise.

Question 7. Should the provisions protecting the tenant under a long-term lease (*erfpacht*)[15] be extended or should further regulation of the relation between the lessee and the owner be left entirely to the parties?

Answer. In cases of obligatory improvements, there should be mandatory provisions in favor of the long-term lessee, e.g., as respects compensation on account of betterments remaining on the land which pass to the owner at the end of the lease.

Question 8. Should it be permissible by act *inter vivos* for one to transfer the fiduciary administration (*bewind*) of his own property entirely to another?

Answer. It is desirable to make provision for transfer by act *inter vivos* of the fiduciary administration of one's own property to another.

Second Series

A. *Law of Obligations*

Question 9. Should expiration of a term stipulated for performance automatically place the debtor in default?

Answer. Expiration of a term stipulated for performance should automatically place the debtor in default, unless it appears that this was not the intent in stipulating the term. This with the reservation that a formal demand must precede cancellation of a contract on account of delay in performance, unless it follows from the content or intendment of the contract that the term is an essential part of the contract.

Question 10. Should the judge be recognized as having a general power on the ground of special circumstances to mitigate the obligation to pay damages?

Answer. The judge should be recognized as having a general power on the ground of special circumstances to mitigate an obligation to pay damages. This with the reservation that no mitigation is to be allowed insofar as the debtor has taken out liability insurance where he was under obligation to do so or where such coverage is customary.

Question 11. Should every one be granted the right to monetary compensation for suffering unlawfully caused (so-called "ideal damages")?

Answer. The right to monetary compensation should not be granted to every one for suffering unlawfully caused (so-called "ideal damages"). However, such compensation should be made in cases where legislation and case law presently recognize it. Furthermore, within reasonable limits, expenditures resulting from an illegal act, and which serve to

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[15] In the existing Dutch Civil Code (Arts. 767 et seq.) *erfpacht* is an institution (contract) whereby one person has the full use and enjoyment of an immovable property belonging to another person and under the obligation of paying an annual rent. *Erfpacht* is usually established for a period of many years; it is a real right, and accordingly it must be recorded.

The grantee under an *erfpacht* may exercise all the rights enjoyed by the owner provided he does nothing to depreciate the value of the property. He must look after the property and make ordinary repairs; he may improve it and erect buildings or plant trees, which are considered immovable and part of the land. At the expiration of the tenancy, the grantee may remove buildings or trees which he has placed there, subject to payment for damages done to the land by such removal. However, if he leaves the buildings or the trees, there is no reimbursement from the landowner even if the property is thereby enhanced in value.

An *erfpacht* terminates at the expiration of the stipulated term, by non-use for thirty years, through failure to pay the rent, as a result of destruction of the property, or by confusion; if there is no stipulated term, it is subject to termination after thirty years upon one year's notice; otherwise, since *erfpacht* is heritable, it may be perpetual.

remove or reduce the injury suffered, should be reimbursed.

Question 11-A. Should the limitation be maintained that in case one has caused the death of another intentionally or culpably, the next of kin only have a right to compensation if they were supported by the deceased?

Answer. The limitation that, in case one has caused the death of another intentionally or culpably, the next of kin only have a right to compensation if they were supported by the deceased, should be retained. The class of next of kin should be extended to include all who had a right to support against the deceased. Moreover, the claims of the next of kin should be extended to include other damages than loss of subsistence, if intentional or grossly culpable conduct on the part of the wrongdoer can be shown. The wrongdoer who has caused the death of another intentionally or culpably, should also reimburse the funeral expenses.

Question 12. Should an employer be permitted by agreement to exclude liability for the shortcomings of his employees? If so, should not an exception be made for cases in which the law requires or it is customary that insurance should be taken out against damages caused?

Answer. Exceptions apart, an employer can exclude liability for the shortcomings of his employees. Such exoneration in any event shall not be allowed when the law imposes an obligation that the employer should carry insurance against the damages caused in the manner in question or when he should reasonably have carried insurance therefor.

B. *Obligations by Operation of Law*

Question 13. Should the Civil Code contain special provisions concerning the liability of the state for unlawful acts committed by its agencies?

Answer. At least for the time being, it is undesirable and also quite impracticable to include in the Civil Code special provisions concerning the liability of the state for unlawful acts committed by its agencies.

Question 14. Should one who commits an illegal act in the course of his employment be personally liable

a. if he believed and in good faith might have believed that his act was lawful?
b. if he has caused the damage not deliberately but culpably?

Question 14-A. In the answer to the preceding question, should a distinction be made whether a civil servant has acted on behalf of the state or another person on behalf of his employer?

Answer. No special provision should be made respecting the personal liability of one in the employ of another, who has committed an unlawful act in the performance of a task assigned to him. In this regard, no distinction should be made between a civil servant acting on behalf of the state and another on behalf of his employer.

Question 15. Should the special liability to which owners of automobiles are now subject be imposed correspondingly upon owners of other dangerous things (inflammable materials, weapons, machinery, etc.)?

Answer. The special liability to which owners of automobiles are now subject should be imposed correspondingly upon the owners of other dangerous things.

Question 16. Should one who on account of mental illness cannot be held responsible for an act, be required to compensate in whole or in part the damages caused by such act?

Answer. Damages caused by mentally deranged persons should be compensated by them.

Question 17. Should the law enumerate various acts which are regarded as unfair competition or are the general provisions respecting unlawful acts sufficient?

Answer. In addition to a general prohibition of unfair competition, the law should enumerate various acts which are regarded as unfair competition.

Question 18. Should it be provided in a general article that one who without

sufficient legal justification is enriched at the expense of another, is obliged to make good the damages suffered by the latter up to the amount of the enrichment, or should the law limit itself to the enumeration of individual specific cases, in which such recovery is allowed?

Answer. Provision should be made in a general article that one who is enriched at the expense of another without adequate legal justification, is obliged to make good the damages suffered by the latter up to the amount of the enrichment.

C. *Legal Acts and Contracts in General*

Question 19. In addition to threats, fraud, and error, should abuse of circumstances (undue influence) be recognized as a ground to annul legal acts?

Answer. In addition to threats, fraud, and error, abuse of circumstances (undue influence), should also be recognized as a ground to annul legal acts. The law should refrain from enumeration of the circumstances of which no abuse is allowed.

Question 20. In case a bilateral contract is not performed by one party, should it be rescinded by the judge or should the claimant be allowed to do so himself?

Answer. In case of nonperformance by a party to a bilateral contract, the claimant himself should be able to rescind the contract. If the debtor has not already been notified in writing, such notice must still precede rescission, unless it appears from the content or intendment of the contract that a stipulated term is an essential part of the contract.

Question 21. Should the law provide that good faith not only may supplement obligations arising from contract and law, but also under special circumstances can extinguish them or exclude their application?

Answer. The law should provide that good faith can supplement obligations arising from contract and law, can extinguish them, or exclude their application. However, such extinguishment or exclusion from application should be possible only if insistence upon what has been contracted or on what is provided by law is improper under the given circumstances.

Question 21-A. Apart from the case where performance of a contract becomes impossible by reason of *force majeure*, should there also be provision for the case in which performance by one of the parties becomes excessively burdensome through unforeseen circumstances? If so, then should the judge alone be able to intervene or may the debtor simply refuse payment?

Answer. In the case where performance of a contract by one of the parties becomes excessively burdensome through unforeseen circumstances, the debtor should be enabled to be relieved of his obligations by the judge or to have the contract modified by him.

D. *Special Contracts*

Question 22. When a specified thing is sold, should the risk of loss pass to the buyer only after delivery, or immediately at the time of purchase?

Answer. In case of sale of a specified thing, the risk passes at the time of delivery.

Third Series

A. *General Provisions on Legislation*

Question 23. Should there be a legal provision how law is to be found in case the laws are silent?

Answer. There should be a legal provision how law is to be found in case the laws are silent. For such case the law should indicate the following order:

a. the legal principles upon which the law is based
b. custom

c. equity.[16]

Question 24. Should the possibility be extended more than at present, that for specified contracts the applicable rules should not be provided by law but by the Crown or some other state authority in collaboration or after consultation with the interested parties?

Answer. The possibility should exist that for specified contracts the applicable rules should be prescribed by the Crown or some other state authority in collaboration with or after consultation with interested parties (standard regulations). Standard regulations should contain only facultative legal provisions.

Question 25. Should the rule that a law can lose effect only by a later law and not through falling into disuse be retained?

Answer. The rule that a law can lose effect only by a later law and not through falling into disuse should be retained, but with the reservation, that legal dispositions of a regulatory nature may be abrogated by a deviating usage.

B. *Rights of the Creative Man*[17]

Question 26. Should special protection be provided by law for models of objects of use?

Answer. It is desirable that special protection should be provided by law for industrial designs and models of use; as concerns industrial models, The Hague agreement of November 6, 1925, revised in London June 2, 1934, concerning the international deposit of industrial designs or models, should be followed.

Question 27. Should the registration of a mark (trade-mark) have no other legal effect than to establish a legal presumption of the first use of the mark, or should registration be a condition for acquisition of the right to a mark or at least for its special legal protection?

Answer. The registration of a mark should have as legal effect that the registration is effective as a use of the mark and that the registration precludes those who thereafter may seek to use the same mark for goods of the same kind, from being able to claim ignorance of the right of the first user. If two years elapse after the registration without contest of the right to the mark, the registration gives the person thereby designated as entitled an exclusive right to the mark.

Question 28. Should a right to a mark be extinguished, if the mark becomes a generic name after the right is acquired?

Answer. The right to a word mark should be extinguished by its becoming a generic name only if the right has been in existence for a specified period (e.g., twenty years).

Question 29. Should provision be made by law to regulate collective marks as well as commercial and industrial marks?

Answer. In addition to commercial and industrial marks, there should be regulations for collective marks. For the last marks, the same requirements should apply as for other marks, except that adequate attention should be given that the collective mark makes known to the public the qualities and characteristic features which the collective mark serves to indicate. Furthermore, care should be taken to avoid inadequate supervision over the users.

C. *Legal Persons*

Question 30. Should Royal approval of the charter (*statuten*) be retained as a condition for acquisition of legal personality by an association? If not, should

[16] This does not refer to the Anglo-American system of equity but rather to the civil law concept which might be approximated by the term "reasonableness." All parts of this question are discussed substantially in another article; see Dainow, Civil Code Revision in the Netherlands: General Problems, 17 La. L.R. (1957) 273.

[17] After objection to this phrase by some members of the legislature, it was changed to "Rights to the produce of the mind." Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, eerste gedeelte Boek 1–4, Toelichting, p. 18 ('s-Gravenhage 1954).

any other requirement be prescribed for acquisition of legal personality than that the charter be drawn up in writing and that account be taken therein of the statutory requirements, or should a preventive control be instituted through a notary by draft in form of a notarial act, or through a governmental agency by declaration of no objection?

Answer. Royal approval of the charter is desirable as a condition for acquisition of legal personality by an association to be obtained through an administrative declaration of no objection.

Question 31. Should not the statutory provisions for the protection of creditors and members, which now are to be found in the Law on Co-operative Associations, be declared applicable to all associations with a material purpose, or at least to associations which are co-operative associations in their nature or should be treated as co-operative associations on account of their carrying on a business?

Answer. It is desirable that the statutory provisions for the protection of creditors and members, which now are to be found in the Law on Co-operative Associations, should be declared applicable to associations which are co-operative in character as well as to those which should be subjected to the same rules as co-operatives on account of their carrying on a business.

Question 32. Should an association without legal personality be recognized as having property separate from that of the members?

If so,

a. should the directors of such associations be liable to suit by creditors, not only personally but also in their capacity as directors?
b. should the directors in their capacity as such be able to represent the property as against third parties?
c. should such property be susceptible of increase by inheritance or legacy?

Answer. It is desirable to recognize an association without legal personality as having property separate from that of the members; however, such property should include no other assets than corporeal movable things and claims against the members. The directors should be liable to suit for the liabilities of the association, not only personally but also in their official capacity. Claims against third parties cannot be asserted by the directors in their capacity as such. The property of the association should not be susceptible of increase by inheritance or legacy.

D. *Commercial Law* (in the sense of the present Code of Commerce)

Question 33. Should a *commandite* partnership by shares (with silent partners whose interest is limited to their shares) be recognized and regulated as a special form of *commandite* partnership?

Answer. Commandite partnership by shares should be allowed, but not in case the shares are made out to bearer or to order.

Question 34. In case of life insurance or annuity for the benefit of a third person, should the creditors of the insured or his trustee in bankruptcy have rights to claim the amount of the insurance and/or to designate the beneficiary?

Answer. In the case of a life insurance or annuity for the benefit of a third person, the creditors of the insured or the annuitant should be able to claim neither the amount of the insurance nor to designate the beneficiary. A reservation should be made for the case in which the insurance or annuity is taken out with knowledge that creditors are prejudiced thereby.

However, the trustee in bankruptcy of the insured, if the designation of the beneficiary is not irrevocable, should be able to change the beneficiary or to exercise the right of the insured to surrender the policy; but if the bankrupt has designated his wife or his children as beneficiaries, then the trustee should be able to exercise these powers only after he has offered to transfer the rights of the insured to the designated beneficiaries upon payment of the cash value of the policy.

Question 35. Should what a third person beneficiary receives from a life insurance or an annuity be classified as a gift subject to reduction and collation?

Answer. What a third person beneficiary receives from a life insurance or an annuity should be regarded as a gift subject to reduction and collation, except in all cases in which the beneficiary is a person with respect to whom a legal or moral obligation of support survives after death. In these last cases, a reservation should be made for excessively high amounts and for the case in which the premium is too high for the income of the insured.[18]

E. *Law of Inheritance*

Question 36. Should the right to inherit on death be still further restricted than to heirs in the sixth degree?

Answer. The right to inherit on death should not be still further restricted than to heirs in the sixth degree.

Question 37. Is it desirable to allow the surviving spouse an intestate share on death different from the share of a child?

Answer. It is not desirable to allow the surviving spouse an intestate share on death different from the share of a child. In addition to this intestate share, the spouse should be allowed a claim, without being required to make any compensation therefor, to take from the household furnishings property up to f. 15,000 in value. Insofar as a community existing between the spouses includes property belonging to the household furnishings, this claim must be exercised at the time of the partition of the community.

Question 38. Should a surviving spouse, who is not separated from bed and board, be entitled to a legitim?

Answer. The spouse should be entitled to a legitim.

Question 39. Should one entitled to legitim always receive his legitimate share as an heir and in property in kind pertaining to the estate?

Answer. One entitled to legitim need not always receive his legitimate share as an heir and in property in kind. He should be satisfied with a sum in money, when such is left to him by the decedent either by a legacy or by a charge for his account upon another and payment in money—except for special cases enumerated by law—can be immediately demanded.

Question 40. Except in cases of necessity (such as military personnel in time of war, persons at sea, persons in localities with which all communication is cut off by war or quarantine), should a holographic will, written and signed by the decedent in his own handwriting, be recognized as valid, even though it is not deposited with a notary?

Answer. Wills written and signed by the decedent in his own handwriting, which are not deposited with a notary, should not be recognized except in the cases of necessity provided by law.

Question 41. Is it desirable to settle successions to a greater extent than at present under the control of and by an administrator appointed by the judge?

Answer. It is desirable to settle successions to a greater extent than at present under the control of and through an administrator appointed by the judge. Appointment of an administrator should be permitted only when the heir so requests or a creditor can show special grounds therefor, to be prescribed by law.

Question 42. Should matters relating to the partition and settlement of successions and other estates be assigned by law to the ordinary judge or should a special judge (the probate judge) be given competence thereof?

Answer. Matters relating to the partition and settlement of successions and other estates should be transferred to a special judge (the probate judge) instead of to the ordinary judge. The probate judge should remain otherwise a member of the ordinary judiciary.

[18] Insured, i.e., the person who has taken out the policy.

Fourth Series

Law of Persons and Family Law

Question 43. If a married woman has a principal residence, separate from that of her husband, should the place of her residence be recognized as her legal residence (*woonplaats*)?

Answer. The married woman's dependent domicil should be abolished.[19]

Question 44. I. Should medical examination of both parties be required before public notice of an intended marriage?

II. If so, in case such examination discloses that marriage with the person examined would be dangerous to the health of the spouse, to the procreation of children, or to their physical or mental development:

a. should marriage with the person concerned be prohibited in special cases?

b. should the other spouse and persons whose consent is necessary be informed concerning the dangers involved in consummation of the marriage?

III. Is it desirable without requiring an examination, to prohibit a marriage on the ground that one of the spouses has certain diseases, to be enumerated by law?

Answer. It should be provided by law that a medical examination in anticipation of marriage is not required.

Question 45. Should married women be granted full legal capacity (*handelingsbekwaamheid*)?

Answer. Married women should be granted full legal capacity.[19]

Question 46. Which system of matrimonial property should be chosen as the legal régime:

a. universal community

b. limited community

c. exclusion of any community?

Answer. The universal community of property under the existing law should remain the rule,[19] but the possibility of deviating therefrom should be regulated in such manner as to take account of real interests so far as possible.

Question 47. I. Should the law establish a maximum for what a second spouse, there being children of the former marriage, may receive by way of gift, intestate succession, or last will?

II. If so, should the maximum apply also to what the second spouse receives from the matrimonial community in excess of what such spouse brought in?

Answer. No distinction should be made in the law of matrimonial property and the law of inheritance between the first and the second or later spouses.

Question 48. Should adoption be permitted in our law?

Answer. Adoption in a limited form and clothed with the necessary protections deserves consideration.[20]

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[19] Answers 43 and 45 have wholly and Answer 46 has partially been realized in Netherlands law by revision of the existing Civil Code (law of June 14, 1956, which entered into force January 1, 1957) in anticipation of the general program of civil code revision.

[20] Answer 48 has been realized in Netherlands law by revision of the existing Code (law of January 26, 1956, entering into force November 1, 1956) in anticipation of the general program of civil code revision.

Comments

SOME OBSERVATIONS ON THE EIGHTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

It is eminently desirable that this country participate in international conferences on conflict of laws. This should be done, first of all, on account of the wisdom and assistance which such conferences can afford us. The subject is of immense importance in the United States. This is obvious in the interstate area where we are inclined to conduct our transactions with little regard for state lines. With the constant increase in our foreign business and in the flow of Americans abroad, the same is also true in the international field. Yet conflict of laws is in a relatively undeveloped state. Many of its areas remain unexplored, and perhaps the majority of its rules are still fluid. This situation, however, is likely to change in the appreciable future, since decision of the many conflicts problems that are now coming before the courts can be expected to result in further crystallization of the subject. The present is therefore an ideal time for independent research and discussion as to what, on the basis of existing knowledge, should be the content of our conflicts rules. It is only to be expected that we can learn much in this regard from foreign experts who have devoted their lives to the study of many of the problems which currently face us.

Our interest in the foreign conflicts rules themselves provides a second reason for participation by this country in international conferences. These rules will naturally be applied by judges abroad in determining the rights and liabilities of Americans. It is therefore incumbent upon us to be familiar with such rules and, where possible, to attend and present the American viewpoint at meetings dedicated to their discussion and formulation. Thirdly, but by no means least, considerations of international relations call for such participation by the United States. Foreign countries consider these conferences to be of great importance, as is evidenced by the distinguished judges, lawyers, and scholars whom they send to attend them. A simple sense of public relations requires that we show our own interest in these activities through the presence of American representatives.

For these reasons, among others, I was happy to attend in October, 1956, the Eighth Session of The Hague Conference on Private International Law as a member of the United States Observer Delegation. This Conference is dedicated to the unification of what we call conflict of laws through the preparation of conventions, covering limited areas of the subject, which it is hoped will thereafter be signed and ratified by the various members. The membership of the Conference currently consists of nineteen nations: Austria, Belgium, Denmark, Finland, France, Western Germany, Greece, Ireland, Italy, Japan,

Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Yugoslavia was represented by an observer at the Seventh and Eighth Sessions, while the United States sent observers for the first time to the Eighth. As presently envisaged, sessions of the Conference will be held every four years. A session normally lasts for a period of approximately three weeks. Its work falls into two categories: (1) preparation of conventions, of which preliminary drafts are frequently prepared in the interval between sessions by special committees at the Conference's direction, and (2) determination of what matters should be put upon the Conference's agenda for future study. At the Eighth Session, the Conference approved four conventions dealing, respectively, with the law governing various questions relating to the sale of goods, with the conditions under which parties to a contract can effectively agree to submit controversies arising thereunder for exclusive determination by the court, or courts, of a particular country, with the law governing the measure of support owed a minor child, and with the recognition and enforcement of decisions respecting obligations to support minor children.

The principal strong points of the Conference are believed to be the following: First, the member nations are generally represented by their foremost experts in conflict of laws. Intimate contact with these men over a three weeks' period cannot fail to give one a fresh insight into the subject and an understanding of how it is approached by men of different nations. Second, the Conference is devoted to the solution of practical, as opposed to academic or theoretical, problems. No one can attend the various meetings without being impressed by the earnest realization of the participants that they are present to serve the public interest and not to satisfy any peculiar desires of their own. Third, the Conference deals with relatively narrow conflicts questions. No group of men, however learned and even with the aid of a preliminary draft, can be expected to perceive, and much less to examine thoroughly, all aspects of some broad area of the subject. Any attempt of this sort must lead to errors and superficialities and at best to a restatement of what has been done and thought in the past. On the other hand, fresh insights and the development of new and better rules can be expected to result when the attention of able men is directed over a protracted period to the study of particular problems. Lastly, the Conference is a working conference and not a social gathering of lawyers. The wives are taken on many pleasant excursions by the Netherlands Government, but, except for a one-day expedition, the delegates themselves sit in morning and afternoon sessions five days a week and in morning sessions on Saturdays. Considerable time is also required to study the minutes of previous sessions and to prepare for discussion of the problems which lie ahead.

The Conference does have some drawbacks, however, from our standpoint. Most important, it is devoted exclusively to the preparation of conventions which involve matters falling in large part within the area reserved to the States under the Tenth Amendment to the Constitution. The United States is

therefore unlikely to become a formal member so long as this situation continues. Presumably, we will remain privileged to send observers, but their role will needs be a limited one. Although treated with the utmost consideration and courtesy, an observer must realize that he is present by sufferance and that his country is not directly concerned with the matters under consideration. Our representatives therefore can hardly enter freely into the discussions or consume much time in presenting what they conceive to be the American point of view. So long at least as this country bears no part of the expenses of the Conference, it is also hardly up to us to suggest topics for study at subsequent sessions. Observer status at the Conference cannot bring the advantages which active membership would entail.

Another difficulty of lesser importance is that French is the only official language of the Conference. One is privileged to speak in English, and, if one does so, one's remarks are translated immediately thereafter into French. What is originally said in French, on the other hand, is not translated into another language. Inevitably, a great advantage in the discussions and debates is enjoyed by those delegates who have French as their native tongue.

During the course of the Eighth Session, the American Observer Delegation suggested that henceforth the Conference should put the product of its labors both in the form of conventions and of uniform laws. Adoption of this suggestion would make it easier for the United States to seek membership in the Conference, since, financial considerations aside, such a status would presumably involve no greater obligation than to bring the draft of any proposed law to the attention of the States. It is questionable, however, whether such laws would be widely adopted in this country. This would probably not be because of objections to their substantive content. Choice of law rules are largely judge-made in both civil and common law countries, and, with some important exceptions, they are generally the same. Rather, failure by our States to adopt a particular law would normally be the result of differences in matters of method and technique.

We Americans, in company with our other common law brethren, are suspicious of attempts to regulate by statute broad areas of any so undeveloped a subject as conflict of laws. Generally, we prefer to proceed on a case to case basis and to decide problems only as they arise. This method may lack the virtues of certainty and predictability of result, but it does avoid the danger of laying down binding rules that may subsequently turn out to have been badly conceived. The drafting techniques of the civilians likewise differ markedly from our own. They are inclined to frame broad rules and to trust that the individual judge will avoid the harsh results to which a literal application of these rules would occasionally lead by application of the public policy (*ordre public*) doctrine. We, on the other hand, are accustomed to draft a statute in terms sufficiently detailed and complex to care for what we hope will prove to be all possible situations and then to expect literal application of the statute by the judge. It is improbable, therefore, that our States would be

satisfied with the form of any uniform law prepared by a group of predominantly civilian lawyers. Redrafting of the statute before submission to the States by some such body as the Commissioners on Uniform State Laws might prove a possible solution of this difficulty. But there would inevitably be the danger that the American version of the statute would be applied somewhat differently in practice than its civilian counterpart. To the extent that this occurred, uniformity of result would not be achieved.

What has been said above can perhaps usefully be supplemented by a brief reference to some of the most important provisions of the recently approved convention on the law governing the transfer of title (*propriété*) in international sales of chattels. Freely translated, these provisions read:

Article 2

The law governing the contract of sale determines as between the parties:

(1) the time to which the seller is entitled to the products and fruits of the goods sold,

(2) the time to which the seller bears risks relating to the goods sold,

(3) the time to which the seller is entitled to any damages relating to the goods sold,

(4) the validity of clauses reserving title to the goods in the vendor.

Article 3

... The transfer to the buyer of title to the goods sold with respect to all persons other than the parties to the contract of sale is governed by the internal law of the country where the goods were located at the time when a claim was made concerning them.

The buyer, however, retains a title which has been recognized as belonging to him by the internal law of a country where the goods sold were previously located. ...

Article 4

Whether the rights of an unpaid seller in the goods sold can be asserted against the creditors of the buyer, ... particularly through an action of rescission or a clause of reservation of title, is governed by the internal law of the country where the goods sold were located at the time of the first claim or attachment concerning such goods. ...

Article 5

The rights which a buyer can assert against third persons who claim title ... in the goods sold are governed by the internal law of the country where the goods were located at the time of such claim.

The buyer, however, retains any rights which have been recognized as belonging to him by the internal law of the country where the goods sold were located at the time when he was put in possession. ...

Article 7

In each of the contracting States, the application of the law determined by the present Convention may be excluded on a ground of public policy (*ordre public*).

Application of these provisions might generally lead to the same results an American judge would reach in identical situations. On the other hand, they do lay down explicit rules for which there is presently little or no common-law authority. They are also examples of civilian methods and techniques which, as mentioned above, differ widely from our own.

Under Article 2, the law governing the contract of sale determines, generally speaking, the respective rights of the buyer and seller in the chattel. This is as

it should be. There is no reason why the rights of the parties as between themselves should depend upon the law of the chattel's situs which may be constantly shifting and wholly fortuitous as of a given moment of time. On the other hand, the law governing the contract will remain constant and will bear a reasonable relationship to the parties, since presumably it will be either the law expressly designated by them for this purpose or else that of the state with which the contract has the most vital connection. An American judge would, it is believed, reach the same result, but the reasoning of the opinions in point is confused and obscure.

Article 2 is a beautiful example of a situation where a group of experts has stated explicitly what the judges, with their manifold preoccupations, have up to now perceived only dimly. This article should be of real interest to our bench and bar; it illustrates the value of having American representatives at the Conference who will later report at home upon the conclusions there reached.

Articles 3 to 5 are concerned with the rights of either the buyer or seller in the chattel as against third persons. What case law there is on the subject in this country suggests that these rights depend upon the law of the state where the chattel was at the time of the transaction upon which the third person's claims are based. The Convention, on the other hand, states narrower rules which distinguish between buyer and seller. It provides in effect that the buyer will prevail if he would do so either under the local law of the state where the chattel was when the claim was made or under the local law of a state where the chattel was when he was put in possession of it.[1] An unpaid seller, however, has no such choice; his rights are made to depend solely upon the local law of the state where the chattel was when it was first seized or when otherwise a claim was made concerning it. These rules are the product of the best legal minds in Europe and are distinctly worthy of study in this country. Presumably we would hesitate to enact them in statutory form until we could tell from actual experience how they would work out in practice. This is not because we are essentially more cautious lawyers than our civilian counterparts. It is simply because we are less eager than they to regulate a given field by statute or convention and also are less willing to permit our judges to depart in a hard case from the literal meaning of a statute on account of public policy notions.

Articles 3 to 5 do not on their face distinguish between two basic situations: that where the chattel is not the subject of a new transaction following its removal to a second state and that where there is such a transaction. Rights in the chattel should not be affected in the first case by the shift in its location, but in the latter case the law of the second state should decide whether, as a result of the new transaction, some third person has acquired rights in the

[1] The second paragraph of Article 3 is more generally worded. But it might in practice be given no wider application than the second paragraph of Article 5 which speaks only of the country where the chattel was when the buyer was put in possession of it.

chattel superior to those of the buyer or seller. Literal application of these articles would not, however, always lead to this result. Suppose, for example, that A delivers a car to B on conditional sale in country X. X law recognizes the validity of A's reservation of title, and hence in that country A's rights in the car are, in the absence of further facts, superior to those of B's other creditors. At the time of the conditional sale, B did have one creditor, C. Wishing to satisfy his debt out of the car, C dogs B's movements and finally attaches the car in Y, an adjoining country, to which B has gone on a week-end visit. If Y local law does not recognize the validity of conditional sales as against third persons, C would prevail under a literal reading of Article 4. Yet it would be shocking if he were to do so, since he has not advanced credit to B in Y or otherwise acted in justifiable reliance upon Y law. Presumably, a European judge would avoid this result by resort to the public policy (*ordre public*) doctrine. We, on the other hand, would not wish to adopt a treaty or statute which would not work well, if literally applied, in situations we could call to mind.

In all probability, this country should not seek formal membership in The Hague Conference until and unless there is a fair possibility of our being able to adopt a substantial portion of the Conference's product. This can hardly be the case so long as the Conference devotes itself exclusively to the drafting of conventions. Nor, as indicated above, would all difficulties be removed if the Conference were to direct part of its efforts to the drafting of proposed uniform laws. On the other hand, this country has, and will continue to have, a very real interest in the Conference's work. This is not only because the conventions which it approves will be applied by foreign judges to determine the rights of Americans abroad. It is also because we, in view of our interstate situation, are concerned perhaps more than any other country in fashioning the best possible rules of conflict of laws. We should not overlook the aid which foreign experts can give us in this connection, and The Hague Conference is perhaps the best place to find these experts at work. On the other hand, we must share some of the Conference's burdens before we can in decency feel free to discuss our problems and viewpoints or to suggest topics which we would like to have the Conference consider. Perhaps an arrangement could be made whereby we would continue in our observer status and yet bear some modest portion of the Conference's expenses.

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THE *INSTITUT DE DROIT INTERNATIONAL* AND AMERICAN PRIVATE INTERNATIONAL LAW

FOR A STORY SOCIETY

Probably the most distinguished nonofficial body dedicated to work on the progressive development of international law[1] is the *Institut de Droit International*. It was created in Ghent in 1873 as a result of suggestions in particular from Francis Lieber[2] and Gustave Moynier. With its restricted number of members, it was—and is—designed to serve as an "academic" body alongside the international association with open membership founded the same year in Brussels, the "Association for the Reform and Codification of the Law of Nations," in 1895 renamed the "International Law Association."

David Dudley Field was one of the eleven founders of the *Institut*.[3] With him, William Beach Lawrence, Emory Washburn, Francis Wharton, and Theodore D. Woolsey were among the first members.[4] Other Americans, nonliving, who subsequently belonged to the *Institut*, are: John F. Dillon, John Bassett Moore, J.-A. Whitely, James Brown Scott, George Grafton Wilson, Elihu Root, Theodore S. Woolsey, Simeon E. Baldwin, Frederic R. Coudert, David Hayne Hill, Charles Chesney Hyde, Edwin Borchard, Charles Evans Hughes, Arthur K. Kuhn, Jesse S. Reeves. John Bassett Moore and Charles Evans Hughes were elected to honorary membership in 1925 and 1936 respectively.

The *Institut* usually meets every other year, at places which vary. It has held 47 sessions, but only once, in 1929, did it meet in the New World, in New York.[5] The work of the *Institut*, consisting of committee reports and discussions at the sessions, is reported in the *Annuaire de l'Institut de Droit International*.[6] No subject of major importance in public or private international law has escaped the attention of the *Institut*. In the 83 years of its existence, a

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[1] The object of the *Institut*, as defined in 1873, is "to aid the growth of international law" —de favoriser le progrès du droit international. Const. art. 1, §2, 45 (2) Annuaire de l'Institut de Droit International [hereafter Annuaire] (1954) xxvi.

[2] For the role of Lieber, who died before the Ghent meeting, see Root, "Francis Lieber," 7 Am. J. Int'l L. (1913) 453, 464–5; Scott, Preface, Resolutions of the Institute of International Law (Scott. ed. 1916) i, vi; Rolin-Jaequemyns, "Communications relatives à l'Institut de Droit International," 5 Revue de Droit International et de Législation Comparée (1873) 667.

[3] Mancini, Asser, Besobrasoff, Bluntschli, Calvo, Field, de Laveleye, Lorimer, Moynier, Pierantoni, Rolin-Jaequemyns.

[4] See Rolin-Jaequemyns, *loc. cit. supra* note 2, at 711.

[5] See 35 Annuaire (1929). Brown, "The New York Session of the Institut de Droit International," 24 Am. J. Int'l L. (1930) 126. *Cf.* Proceedings of the Fourth Conference of Teachers of International Law (1930) xi.

[6] Since 1950 published in Basle: Verlag für Recht und Gesellschaft A. G. An abridged edition of the Annuaire in 7 volumes, covering the sessions from 1875 to 1913, was brought out in Brussels, 1928/31.

total of 137 resolutions have been passed on topics first considered in committee, 80 on questions of public international law and 57 in the field of private international law.[7] In accordance with the high standing of the members of the *Institut*, its work has had strong influence on legal thinking. It is sufficient to look at the number of references to the *Annuaire* in legal publications.[8] As the secretary general of the *Institut* recently pointed out,[9] aside from the general treatises, the *Annuaire*, together with the *Cours de l'Académie de la Haye de Droit International*, has had a unique place in the literature on public and private international law.

Private international law has, since the beginning, been given the same attention as public international law. Upon Mancini's suggestion, unification of rules of private international law was put on the agenda of the very first session,[10] and Mancini prepared his great report on this question for the Geneva, 1874, session.[11] One of his suggestions[12] found realization twenty years afterwards in the creation of the governmental Hague Conference on Private International Law.[13] In international conferences as well as in domestic law work, the Institute's resolutions and drafts have played their rôle.

Important topics in conflict of laws have been dealt with by the *Institut* since the end of the Second World War. At the Lausanne session,[14] in 1947, a committee report on "Proof in Private International Law" was available and considered and a resolution adopted.[15] At Brussels,[16] in 1948, a report on "Divorce Jurisdiction," H. C. Gutteridge, reporter, was discussed; a resolu-

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[7] Topics listed: 45 (2) Annuaire lxviii (public international law), lxxiii (private international law) (1954). Text in the corresponding volumes of the Annuaire and, for older resolutions, in the several editions of the "Tableau Général de l'Organisation, des Travaux et du Personnel de l'Institut de Droit International": 893; 1904 (for 1894 to 1904); 1919 (for 1904 to 1914); lastly, 1920 (for 1873 to 1913), prepared by Carnegie Endowment for International Peace, James Brown Scott, editor (Oxford University Press). English translation of resolutions on public international law in: Resolutions of the Institute of International Law dealing with the Law of Nations (James Brown Scott, ed., 1916).

[8] See, e.g., Analytical Index to the Am. J. Int'l L. (1907–1920) (1921) 143; *id.* (1921–1940) (1941) 282.

[9] Professor Wehberg, Report, 45 (2) Annuaire (1954) 45, 50.

[10] See Rolin-Jaequemyns, *loc. cit. supra* note 2, at 689.

[11] See Report, 7 Revue de Droit International et de Législation Comparée (1875) 329, 361; Mancini, "De l'utilité de rendre obligatoires pour tous les États, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales de Droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles," 1 Journal du Droit International (1874) 221, 285.

[12] Mancini, *loc. cit. supra* note 11, at 238.

[13] See Asser, "La codification du droit international privé," 25 Revue de Droit International et de Législation Comparée (1893) 521.

[14] Of American members, Philip Marshall Brown in attendance. See Brown, "Lausanne Session of the Institute of International Law," 42 Am. J. Int'l L. (1948) 104

[15] 41 Annuaire (1947) 14 (report Arminjon), 191 (discussion), 260 (resolution).

[16] Arthur K. Kuhn in attendance. See Kuhn, "Brussels Conference of the Institute of International Law," 42 Am. J. Int'l L. (1948) 878.

tion was adopted.[17] At Bath,[18] in 1950, committee reports were available on: "Influence of Demographic Conditions on Rules of Conflict of Laws," "Political, Tax, and Monetary Laws in Private International Law," and "Commission, Brokerage, and Commercial Agency in Private International Law."[19] The first-named report was taken up at the Siena,[20] 1952, session and a resolution adopted.[21] Committee reports were ready on "Arbitration in Private International Law" and "Consequences of Different Nationality of Spouses on Effects of Marriage."[22] A new committee was set up on "Renvoi in Private International Law."[23] At Aix-en-Provence,[24] in 1954, the *Institut* discussed "Tax Laws in Private International Law" and passed a resolution.[25] A supplementary report on "Consequences of Different Nationality of Spouses on Effects of Marriage" was available.[26] The last-named subject was taken up at the Granada,[27] 1956, session. After difficult discussions, a resolution was adopted.[28] The text is given in translation[29] in the footnote.[30] The *Institut* decided to constitute three more committees on conflicts topics, namely, on

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[17] 42 Annuaire (1948) 63 (report Gutteridge), 240 (discussion), 281 (resolution).

[18] Manley O. Hudson and Charles Chesney Hyde in attendance.

[19] 43 Annuaire.

[20] Arthur K. Kuhn in attendance. See Kuhn, "Siena Conference of the Institute of International Law," 46 Am. J. Int'l L. (1952) 718.

[21] 44 (2) Annuaire (1952) 407 (discussion), 473 (resolution), 477 (in English).

[22] 44 (1) Annuaire (1952) 469 (arbitration report Sauser-Hall); 44 (2) Annuaire 1 (Marriage report Batiffol and Valladão).

[23] 44 (2) *id.* (1952) 467, 583 (composition of the committee).

[24] Philip Marshall Brown, Arthur K. Kuhn, Green H. Hackworth in attendance.

[25] 45 (2) Annuaire (1954) 228 (discussion), 295 (resolution), 302 (in English).

[26] 45 (1) Annuaire (1954) 231.

[27] Hans Kelsen, Philip C. Jessup, George A. Finch in attendance. See Finch, "L'Institut de Droit International at Granada," 50 Am. J. Int'l L. (1956) 640.

[28] See Finch, *loc. cit. supra* note 27, at 642, 646; Freymond, "La quarante-septième session de l'Institut de Droit International," 53 Friedens-Warte (1956) 245, 246, 261.

[29] Under the Rules, the language for the discussions is French, exceptions being possible with permission of the president. Rules art. 27 (1), 45 (2) Annuaire (1954) xliv. Since a decision of Sept. 5, 1950, members may speak in French or in English; reporting continues to be in French, but the resolutions shall be published in both languages, the French being the official text. 45 (2) Annuaire (1954) xlviii.

[30] (Our translation).

CONSEQUENCES OF DIFFERENT NATIONALITY OF SPOUSES ON EFFECTS OF MARRIAGE

The *Institut de Droit International*,

Considering that, when family law relations are determined by the national law, conflicts of laws regarding the effects of marriage may result from different nationality of the spouses;

Recommends for the solution of such conflicts adoption of the following rules:

Article One

There shall be applied, for effects of marriage on family law relations of a personal nature, between spouses of different nationality,

(a) the law of the common habitual residence of the spouses;

(b) in the absence of a common habitual residence of the spouses, the law of their last

"Torts in Conflict of Laws," "Conflicts in Air Law," and "Corporations in the Conflict of Laws."[31] Designation of reporter and committee members is by the Bureau of the *Institut*.[32]

The *Institut* is composed of members and associate members, and honorary members. Under a maximum set in 1880, no more than sixty members and sixty associate members may be elected.[33] Vacancies in the full member group are filled by electing associate members to full members. The election of associate members is governed by the following rules:[34] For countries with less than three members, the Bureau of the *Institut* may present candidates. In the case of countries with at least three members and associate members altogether, presentation of candidates is by the national group after consultation of all its members and associate members under the chairmanship of the member longest with the Institute. Persons who have obtained the absolute majority of the votes of those forming the national group are candidates of the group. Their names, as well as the number of votes they have received, together with a curriculum and list of publications for every candidate, are communicated to the secretary general of the *Institut*. From among the certified candidates the members and associates elect new associates in the case of vacancies.

At the present time, the *Institut* has one American honorary member, Hans Kelsen, elected in 1954, and nine American members and associate members:[35] Philip Marshall Brown, elected associate in 1921 and member in 1928; Manley O. Hudson, elected associate in 1936 and member in 1948; Edwin D. Dickinson and Green H. Hackworth, elected associates in 1948 and members in 1954; Charles G. Fenwick and Philip C. Jessup, elected associates in 1948; George A. Finch, elected associate in 1950; Herbert W. Briggs and Quincy Wright, elected associates at the last session in 1956. The *Institut* had lost two American members since the previous meeting, Arthur K. Kuhn in 1954 and Frederic R. Coudert in 1955, both full members.

As far as representation of public international law is concerned, this list of

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common habitual residence and, in case there had never been a common habitual residence, the law of the place of celebration of the marriage.

Article Two

There shall be applied, for effects of marriage on family law relations of a patrimonial character, between spouses of different nationality, the law of the first matrimonial domicile and, in case there had never been a matrimonial domicile, the law of the place of celebration of marriage.

[31] 46 (2) Annuaire—(1956). See Finch, *loc. cit. supra* note 27, at 643.

[32] Const. art. 17, 45 (2) Annuaire (1954) xxvi. The Bureau is composed of the president, 3 vice-presidents, secretary general, and treasurer. Const. art 9 (3), *ibid.*

[33] Const. art. 3, 45 (2) Annuaire (1954) xxvi.

[34] Rules art. 8, 45 (2) Annuaire (1954) xxxvi.

[35] Membership list: 45 (2) Annuaire (1954) xiv. Changes in 1956 given in Finch, *loc. cit. supra* note 27, at 641. In 1956, fifteen candidates were presented for eleven vacancies in the associate member group. Eight associate members were raised to rank of full member, no American among them.

members cannot but cause great satisfaction. On the other hand, the inadequate representation of private international law cannot, and should not, be overlooked. Foreign members openly express bewilderment at the absence of their American counterparts—an absence over which they have no influence. No basis exists for assuming that American authorities on private international law would have a lesser chance of being elected than public international law specialists. Except for the entries from this country, the membership list of the *Institut* is the international "Who Is Who" for private as well as public international law.[36] While, to speak only of the nonliving, the names of a Beale, a Lorenzen, a Cook, or an Ernst Rabel, are not in this "Who Is Who," no English authorities, for example, on private international law, past or present, are missing.

This unfortunate situation in the *Institut* reflects a somewhat parallel development in the American Society of International Law where private international law has been losing ground constantly.[37] The definition of the object of the Society is not clear, it is true,[38] and the composition of its membership with the strong percentage of political scientists may make maintenance of a reasonable balance between public and private international law precarious. But this is not so everywhere. England's Grotius Society, after a Charter amendment in 1920,[39] has coped successfully with the situation. The American Branch of the International Law Association[40] has experienced no difficulties of this kind. Joint consideration of problems in both fields can be of great value to both sides and prevent undesirable departmentalization, disadvantageous especially for the many topics touching both fields.[41] But, looking at other countries, France has had considerable success with its *Comité Français*

[36] In 1954, the following were members of committees on private international law: Ago, Alfaro, Arminjon, Audinet, Babinski, Bagge, Batiffol, Bolla, Borel, Cheshire, Colombos, Coudert, Gutzwiller, Lemonon, Lewald, Makarow, Maridakis, Matos, Maury, Morris, Offerhaus, Planas Suarez, Perassi, Ripert, Sauser-Hall, Trias de Bes, Valladão, Vallindas, Vallotton d'Erlach, Fernand de Visscher, Wengler, Yanguas Messia. 45 (2) Annuaire (1954) 400. Among the new members elected in 1956 are: Egawa, Gihl, Quadri, Wortley.

[37] Special reference is made to the topics chosen for discussion at the annual meetings in recent years.

[38] "The object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." Const. art. 2, [1955] Proc. Am. Society of Int'l L. xiii.

[39] "The objects of the Society shall be to afford facilities for discussion of the Laws of War and Peace, and for interchange of opinions regarding their operation, and to make suggestions for their reform, and generally to advance the study of public and private international law." Rules art. 2, 40 Transactions of the Grotius Society (1954) xv.

[40] "The objects of the Association include the study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law, and for the unification of law, and the furthering of international understanding and goodwill". Const. art. 2, as amended in 1934, Report of the Forty-Sixth Conference of the International Law Association, Edinburgh, 1954, (1955) xviii.

[41] See Jessup, Transnational Law (1956), for a recent magistral study in both areas.

de Droit International Privé[42] created in 1933, and Germany has followed suit recently with its *Deutscher Rat für internationales Privatrecht.*

For the United States, formation of a small working group of conflicts specialists, scholars and practitioners, may well be a sound step to take. An advisory group on conflicts problems on the international level is needed. The Government takes part in the Inter-American Council of Jurists which deals with public and private international law. An American is on the Inter-American Juridical Committee which, among other things, has revision of the Bustamante Code on Private International Law under consideration.[43] The State Department is sending delegates and observers to international conferences dealing with conflicts problems. Preliminary drafts need to be studied to instruct delegates. Conference results require examination from the point of view of possible use in domestic legislation. No standing expert body is at present available for such purposes, and no doubt the group could, and would, engage in many other activities in the field. It might assist in the revision of the Conflicts' Restatement. In Joseph Story this country has its patron saint for conflict of laws. A *Story Society* dedicated to the study of "Conflict of Laws, Foreign and Domestic," will be both useful and an appropriate memorial to the father of modern private international law who taught the whole world conflicts law without its being realized, as the late Martin Wolff once said.[44]

The lack of enthusiasm for problems of private international law among certain, but by no means all, groups principally interested in public international law is a phenomenon perhaps not without relation to certain official attitudes with regard to United States participation in international unification work in the conflicts field. Over a period of three quarters of a century successive administrations told the world that, for reasons "based upon the relationship between the Federal Government and the states of the Union," this country cannot take part in international efforts to unify rules of conflict of laws.[45] If this were so, work like that undertaken by the *Institut de Droit International* could command only limited attention.

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[42] See the "Travaux" of the Comité and the volume, La Codification du Droit International Privé (1956). *Cf.* Loussouarn, "French Draft on Private International Law and the French Conference on Codification of Private International Law," 30 Tul. L. Rev. (1956) 523, 5 Int'l & Comp. L. Q. (1956) 378.

[43] See [1949] Inter-American Juridical Yearbook 320, [1950/51] *id.* 289, 302, [1952–54] *id.* 169, 271, 297.

[44] ". . . und Story wird der heimliche Lehrer der Welt." Wolff, Internationales Privatrecht (1933) 17.

[45] References in Nadelmann, "Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law," 102 U. of Pa. L. Rev. (1954) 323. *Adde*: statement respecting calling an international conference on Recognition and Enforcement of Foreign Arbitral Awards, made at the 19th session of the Economic and Social Council of the United Nations that the United States was unlikely to participate in an international conference in view of its long-standing position on such matters, based in part upon the relationship between the Federal Government and the states of the Union. [1955] Yearbook of the United Nations 245.

Inherent in this official position was an assumption that, if the topic to be dealt with is within the jurisdiction reserved to the states, as is conflict of laws mostly but not always,[46] the federal government need not look after the interests of the states or cannot do so without interfering with their jurisdiction. Possibly, before the era of proceeding through uniform legislation, the argument could be sustained. It has long been outdated. Treaties are only one of several means to unify rules of law. Uniform legislation is another. The latter is adaptable to federal systems like ours and has the advantage over treaties that mistakes in drafting can be removed with less difficulty than from international conventions. Drafting in the conflicts field has rarely survived practical tests over a long period of time. It is a fact that all countries do not agree on the respective merits of treaties and uniform laws, but each country can proceed in its own way, and should, the result being the only important thing.

Even where legislation is deemed not desirable, or deemed premature, international drafting can still have considerable practical value. Improvement and unification of law is also being attempted by "Continuing Restatements" of the law. International drafts deserve attention in such restatement work. To paraphrase what one in a good position to judge recently said, much enlightenment can be gained by comparing the solution reached elsewhere, and confidence in the correctness of one's own rules will be fortified by the fact that those applied or suggested by others are essentially the same.[47]

Far from protecting "state rights," nonparticipation by our government in international efforts to unify rules of private international law has worked to the disadvantage of the country as a whole. The American viewpoint on desirable rules has not been presented. Improvements in international co-operation have been obtained among other countries but not by the United States. International judicial assistance is one example,[48] recognition abroad of money judgments another.[49] This country has fallen behind where progress could be made without running into constitutional difficulties.

A turning point in the not too satisfactory chapter, "The United States and International Efforts to Unify Rules of Private Law," seems to have been reached finally. While the Government failed to send representatives to the recent United Nations Conference on Maintenance Obligations,[50] it appointed

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[46] For example, not in the area of foreign commerce. U. S. Const. art. I, §8, cl. 3.

[47] Reese, Book Review, 42 A. B. A. J. (1956) 970.

[48] See Jones, "A Commission and Advisory Committee on International Rules of Judicial Procedure," 49 Am. J. Int'l L. (1955) 379; Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform," 62 Yale L. J. (1953) 515.

[49] See Nadelmann, "Non-Recognition of American Money Judgments Abroad and What to Do About It," 42 Iowa L. Rev. (1957) 236.

[50] A Canadian Observer Delegation was present, explaining the Canadian constitutional situation, advising on the status of Canadian provincial law, and assisting in drafting problems. See Record of the United Nations Conference on Maintenance Obligations. E/Conf. 21/SR.1-14 (1956). The convention of June 20, 1956 adopted by the Conference contains a "federal state" clause: "With respect to those articles of this convention that come within

an Observer Delegation for the Eighth Session of the Hague Conference on Private International Law. Judging from the composition of the Delegation, the State Department meant to have possible state interests "observed" likewise, for nominees from such organizations as the National Conference of Commissioners on Uniform State Laws and the American Law Institute were on the United States Observer Delegation.[51] Even without the formal testimony of the Delegates,[52] it may be assumed that presentation of the American point of view was a progress over nonrepresentation, whatever the ultimate fate of the four conventions adopted by the Hague Conference[53] and whether the rules embodied in these conventions—two in the area of foreign commerce and two in fields reserved to the states—commend themselves for incorporation in federal or state legislation.

If co-operation commends itself on governmental level, the need for active participation in the work of the *Institut de Droit International* has become even greater. Spadework for subsequent efforts on the governmental level is often done by institutions like the International Law Association and the *Institut de Droit International*. And much can be accomplished without ever requiring international governmental sanction. Membership in the *Institut* is a private affair. The question of American representation in private international law on the *Institut* is of more than private concern. This country's interest in greater uniformity of rules of conflict of laws has never been negligible; it is not at this time. Creation of the suggested Story Society will underscore the fact.

KURT H. NADELMANN*

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the legislative jurisdiction of constituant states, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles *with a favorable recommendation* to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment" (emphasis added). U. N. Convention on Recovery Abroad of Maintenance, art. 11 (b). Text in 31 St. John's L. Rev. (1956) 40, 44. See Contini, "The United Nations Convention on the Recovery Abroad of Maintenance," 31 St. John's L. Rev. (1956) 1, 32. Even if constitutionally unobjectionable, a required—ineffective—international undertaking to make a favorable recommendation to the states, rather than facilitating matters, would seem to make co-operation of federal unions of the United States type unnecessarily more difficult.

[51] See K. H. N., "The Eighth Session of the Hague Conference on Private International Law," 5 Am. J. Comp. L. (1956) 709 *infra*.

[52] See Reese, "Some Observations on the Eighth Session of the Hague Conference on Private International Law," 5 Am. J. Comp. L. (1956) 611 *supra*.

[53] Text in 5 Am. J. Comp. L. (1956) 650 *infra*.

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INTERNATIONAL UNIFICATION OF THE LAW OF SALES

In the article "In Memory of Ernst Rabel" (5 Amer. J. of Comp. L. (1956) 185) reference was made to Rabel's work concerning the international unification of the law of the sale of goods. This part of Rabel's work was undertaken

upon the request of the Institute for the Unification of Private Law in Rome. On page 192 it was stated that "The work of preparing an international convention for the unification of the law of sales was taken over after the War by the government of The Netherlands, by which it was placed upon the agenda of the Sixth Hague Conference of Private International Law."

I have been informed by the Secretary General of the Institute, Dr. Mario Matteucci, that the postwar role of the Institute has been considerably more extensive.

After the War, the study was resumed directly by the Institute for the Unification of Private Law, and a special committee, which included Professor Rabel among its members, met at Santa Margherita, Italy, in October 1950. Later on, the President of the Institute, having been informed that the Seventh Session of the Hague Conference on Private International Law was to discuss a convention on the conflicts of laws arising from contracts of sales, proposed to the Government of The Netherlands to convene an *ad hoc* conference for the purpose of examining the draft of uniform substantive law on the sale of goods prepared by the Institute.

Thus, two international conferences took place at The Hague in 1951, both on invitation by that Government, but completely separate from each other. The first—a regular session of the permanent Conference on Private International Law—took place in October; the second, sponsored by the Rome Institute and dealing with the unification of substantive law, lasted from November the 1st to the 10th.

MAX RHEINSTEIN

NEW LEGISLATION

MEXICO: NEW LAW ON INVESTMENT COMPANIES—The Investment Companies Act (Ley de Sociedades de Inversión) of December 30, 1955, at present in force in Mexico, was published in the Diario Oficial, December 31, 1955. This was the third of a series of statutes enacted on the subject. It superseded the law of December 30, 1954, which, in its turn, had superseded the first law dated December 30, 1950. The new law shows considerable differences and improvements with respect to the previous two. Although somewhat influenced by the American Investment Companies Act of 1940, it has a number of characteristics of its own in which it differs considerably from its model.

Long before the enactment of specific laws concerning investment companies, the Mexican legal system had recognized the peculiar function of such companies, namely, the issuance of participating certificates or shares. By decree of August 30, 1933, which amended the General Law of Credit Institutions of June 28, 1932, then in force, trust institutions and departments were empowered to issue nominative certificates evidencing the participation of several co-owners in property, negotiable instruments, or securities, or the participation of creditors in liquidation proceedings in which trust institutions were receivers. The Organic Law of Nacional Financiera, S.A., of 1940 (a

government finance corporation) includes the power to issue participating certificates, nominative or to bearer, evidencing the participation of different co-owners in negotiable instruments or securities. This corporation, during a period of fifteen years, has issued certificates amounting to $1,635,000,000.00 (Mex. Cy.).

However, the certificates authorized by the decree of August 30, 1933, and the succeeding statutes, embody features alien to "orthodox" participating shares, as such certificates may represent interests in all kinds of property, including not only securities but other types of personal property and even real property.

Under the new Investment Companies Act, a corporation, in order to do business, must obtain the authorization of the Federal Government. The authorization is discretionary and granted through the Department of Finance and Public Credit upon the advice of the Bank of Mexico (the central bank) and the National Securities Commission (Articles 3, 5). The application for authorization must contain a program of activities, stating the policy to be followed in the sale of the stock, the manner in which the diversification of the portfolio is to be accomplished, and how the distribution of profits is planned (Article 4).

Investment companies must be organized as joint stock corporations (*sociedades anônimas*) with a minimum paid in capital of five million pesos, represented by common stock. An investment company may have indefinite duration, and the number of directors must not be less than five (Article 2, paragraphs I, II, VI, VII).

At least 80% of the total assets of investment companies must consist of cash and securities, with the proviso that the investment in voting stock of a single business concern shall not exceed 25% of the paid in capital of the investment company nor 30% of the capital of a corporation the stock of which is bought by the investment company. Investment companies may invest up to 30% of their paid in capital and reserves in negotiable instruments or securities issued or guaranteed by national banking institutions (those in which the Federal Government is a stockholder) (Art. 8). Investment companies may deal only in securities registered in the National Securities Registry (Art. 9).

The investment companies are required to state in their tax returns, corresponding to Schedule I of the Income Tax Law (commerical activities), income received as dividends and interest, deducting the same within the chapter relative to deductions; income received as holders of bonds and like securities are taxable under Schedule VI of the Income Tax Law (dividends, interests, etc.) unless exempted by special laws; dividends declared by the investment companies are exempt under Schedule VI (Article 15, paragraphs IV, V, VI).

Investment companies shall not issue bonds, receive cash deposits, mortgage their property, pledge negotiable instruments or securities in their portfolio, lend money, purchase stock of corporations engaged in purely intermedi-

ate commercial activities, purchase any kind of foreign securities except those issued to finance basic industries located in Mexican territory (Article 11, paragraphs I, II, III, IV, VI, VII, VIII, IX).

Investment companies are subject to the rules issued by the National Securities Commission approved by the Department of Finance and Public Credit, and are also under the inspection and supervision of said Commission (Art. 13).

Not a single investment company was organized under the first two laws. During 1956, two applications were submitted to the competent authorities. These were approved, and both companies have been organized, one of which is already operating.

One may ask to what extent the enactments on investment companies actually represent a necessity in Mexico.

Various writers have emphasized the fact that investment companies are a consequence of specific factors and only appear under special circumstances. Thus, referring to the investment trust, Steiner has said: "It is a product of certain economic conditions. It arises only in countries that are approaching economic maturity. It further requires a considerable body of more or less inexperienced savers, unable because of lack of opportunity to employ their funds directly in business undertakings" (*Investment Trusts. American Experience*, page 7). Ryals and Cox have stated: "The development of investment trusts is practicable only in those countries where wealth has accumulated and the inhabitants have money savings to invest" (*Investment Trusts from the Investor's Point of View*, page 25). It has also been noted that: "The first British investment trust movement grew out of a quest for high-yield fixed-income securities, this quest being precipitated by the declining rate of interest obtainable on Consols and safe domestic mortgages." (John A. Loftus: *Investment Management. An Analysis of the Experience of American Management Investment Trusts*, page 19). Even in France, where the investment companies were recognized by the ordinance of November 2, 1945, Professor Joseph Hamel has expressed himself as follows: "no doubt, a period of education will be necessary before the *sociétés d'investissement* find among us the success attained by investment trusts in the Anglo-Saxon countries" (*Les Sociétés d'Investissement*, page 55).

Present economic conditions in Mexico, as regards the existence of sufficient public savings and possibilities of adequate diversification in investments, together with the high yield of fixed income securities (usually 8%), make the enactment of statutes on investment companies seem premature, and the success of the investment companies, themselves, doubtful. It may be that the tax advantages granted by the law account in part for the above applications to organize two companies.

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VENEZUELA: COMMERCIAL CODE; LIMITED LIABILITY FIRMS—A number of amendments to the Commercial Code were enacted by Law of July 26, 1955 (Gaceta Oficial, extraordinary No. 462, Oct. 17, 1955; Revista de la Facultad de Derecho, Caracas, No. 7, 1956, p. 159). The amendments affect minors, married women, books of accounts, fraudulent checks. New articles (151, 152) regulate sales in bulk of a going business. The greatest innovation is the introduction of the limited liability firm (*sociedad* or *compañía de responsabilidad limitada*, arts. 214 *seq.*; 312–336). Venezuela follows the example of other Latin-American countries and their European models, with the German GMBH as starting point (see Eder, "Limited Liability Firms Abroad," 13 Univ. of Pittsburgh L. Rev. (1952) 153; De Sola Cañizares-Aztiría (1950–1954), reviewed in this Journal (Vol. 4 (1955) 285). This notwithstanding that the relative ease in organizing and operating stock corporations in Venezuela, in contrast to other countries, rendered this special type of organization less urgent. There may well be situations however, where the limited liability firm may prove more attractive to entrepreneurs and investors than the stock company. The new legislation follows the generally familiar type and calls for little special attention. The interests of the associates may not be represented by negotiable certificates; the minimum quota is 1000 bolivares (U.S. $300); minimum capital 20,000 Bs; maximum 2,000,000 Bs. The entire capital must be subscribed; and one half paid in if in cash or in full if in property (arts. 201(4), 313, 315, 316). There is no limitation on the number of partners. Auditors (*comisarios*) are obligatory for companies with a capital of over 500,000 Bs. (art. 327). Considerable latitude is permitted in drafting the articles of association, the statutory provisions in general being suppletory not mandatory. In matters not provided for in the new law, such provisions as to stock companies and general partnerships as are not incompatible with the nature of the limited liability firm are applicable (art. 336). Numerous other articles of the Commercial Code are amended in order to harmonize them with the introduction of this new type of business organization.

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VENEZUELA: TRUST LAW—Venezuela is the latest of the Latin-American countries to follow the swelling trend of adopting and adapting the Anglo-American trust. By Act of July 23, 1956, the Congress enacted a trust law (*Ley de Fideicomisos*). The chief draftsman was Dr. Roberto A. Goldschmidt, a well-known comparatist, formerly of the Institute of Comparative Law of Córdoba (Argentina) and at present adviser on commercial law to the Venezuelan Government and director of the Institute of Private Law of the Central University, Caracas. Goldschmidt has long been a student of the Anglo-American trust and recently published a book on the subject.[1]

[1] Goldschmidt and Eder: El Fideicomiso (Trust) en el Derecho Comparativo (especialmente Americano) Buenos Aires, 1954.

The definition of a trust in the Venezuelan law in essence follows that of Dr. Ricardo J. Alfaro in his draft of a uniform law (Dr. Alfaro was the pioneer of the trust in Latin America and the author of the first statute, that of Panama in 1920). A trust is defined as a legal relation whereby one person called the settlor (*fideicomitente*) transfers property to another called the trustee (*fiduciario*) who is obligated to use it for the benefit of the settlor or of a third person, called the beneficiary. The trust property is not subject to the claims of the personal creditors of the trustee (art. 2). The trust may be created either *inter vivos* or by will (arts. 3, 4); if of real estate, the transfer *inter vivos* must be recorded in the real estate registry to be effective against third parties and if an act of commerce be involved, whether the property be real or personal, appropriate recording in the commercial registry is required (art. 5). A trust may be created in property of any kind, save that which is strictly personal to the holder (art. 6). The common law rule as to perpetuities (lives in being) is substantially followed; trusts for the benefit of juristic persons are limited to 30 years (arts. 8, 9). The difficulties involved in the adoption by civil-law countries of the trust by the institution of forced heirs and the *légitime*[2] are squarely met and a compromise solution arrived at. A trust of the *légitime* to pay the income may be created for one who is a spendthrift or insolvent, but terminates if he has ceased to be a prodigal or is no longer insolvent; for incompetents during the period of incompetency, terminating in the case of minors upon their coming of age (arts. 10, 11). Following the rule in Mexico and elsewhere, only domestic banking institutions and insurance companies duly authorized pursuant to the banking laws and executive regulations have capacity to be trustees (art. 12). There may be a plurality of beneficiaries, but contrary to our law, only a single trustee, and a trustee cannot be one of the beneficiaries (arts. 23, 13). The duties of the trustee and the rights of the beneficiary are in essence that of our law (arts. 14 *seq.*). Recourse to the court for instructions is authorized (arts. 16, 17). Acts executed in breach of trust, without consideration or with third parties who have or should have knowledge of the trust, are voidable at the instance of a vested or contingent beneficiary or of the trustee. Article 30 defines who is the competent judge for questions arising out of the trust, and the final article (31) imposes criminal liability for intentional breach of trust by officers of the trustee company.

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[2] See this Journal: vol. 2 (1953) 25 (Garrigues); vol. 2 (1953) 204 (Bolgár).

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DECISIONS

INDIA: FIRST DECISION OF SUPREME COURT INVOLVING CONFLICT OF LAWS; LAW APPLICABLE TO DEBT—The Supreme Court of India delivered its first decision relating to conflict of laws in the case of *Delhi Cloth and General Mills*

Co., Ltd. v. *Harnam Singh*[1] in April 1955. The partition of India into India and Pakistan on the 15th of August 1947 gave rise to a state of affairs from which the present case arose. The plaintiffs were partners of a firm known as Harnam Singh Jagat Singh, which carried on the business of cotton cloth dealers at Lyallpur, which now forms a part of Pakistan. The defendants, Delhi Cloth and General Mills Ltd., have their head office in Delhi, India and carried on business at Lyallpur before partition. The plaintiffs purchased cloth from the defendants from time to time and made advance lump sum payments against their purchases. At the time of partition, the plaintiffs had a balance of about Rs. 11,496 with the defendants. Immediately after partition, a migration of Hindus from Pakistan to India and of Muslims from India to Pakistan took place on an unprecedented scale,[2] and a considerable amount of property was left in the country from which the migrants fled. The plaintiffs in this case also fled from Pakistan to India and thus became "evacuees" in Pakistan. The Pakistan government froze all evacuee assets and later ordered that all evacuee assets in the hands of Pakistani residents be transferred to the Custodian of evacuee property.[3] The government of India took similar measures to freeze all the property of the Muslim evacuees who left for Pakistan.[4] Both governments accomplished this by various ordinances whose immediate object was to protect the property of the evacuees from looting and destruction. The plaintiffs made a series of demands upon the defendants at Delhi, but since the defendants had already paid the said amount to the Custodian in Pakistan they refused to pay the plaintiffs. The plaintiffs then sued the defendants in India for the recovery of the said amount, and the Circuit Bench of the Punjab High Court delivered a judgment in their favor, against which the defendants appealed to the Supreme Court.

The plaintiffs took the position that they were not paid by the Custodian in Pakistan and that the Pakistani law did not apply to the debt because of the presence of the plaintiff in India and that if it did apply it was confiscatory and therefore against the public policy of the forum. The defendants pleaded that they were prohibited from paying under the Pakistani ordinance. The Supreme Court did not accept any of the contentions of the plaintiffs. After a scrutiny of much documentary material, the court characterized the claim as a debt, observing that it arose out of a transaction which had the appearance of a running account. Had the court characterized the claim as technically a running account, it could have thrown it out on the ground that

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[1] (1955) S.C.J. 645; A.I.R. (42) 1955 Sup. Ct. 590: Per Bose J.

[2] For a brief and general account of the refugee problem in India and Pakistan, see H. R. Rep. by Emanuel Celler, Member, Committee on the Judiciary, on Refugees in India and Pakistan, 82nd Cong., 2nd Sess. (1954).

[3] See Bhawani Lal and Harbans Lal Mital, An Encyclopedia of Laws Relating to Evacuee's Property and Displaced Persons in India and Pakistan (1951).

[4] *Ibid.*

the demand was not made at Lyallpur, the branch at which the money was deposited.[5]

Thus, the case involved a problem of creditor-debtor relationship affected by foreign law. The obligations arising therefrom could be looked at from the contractual point of view and could be determined in accordance with the proper law of the contract, or alternatively, the debt could be considered as property, given a location in space, and determined in accordance with the law of the situs.[6] The court considered both these theories in arriving at its decision.

Considering the case from the contractual point of view, the court found that most of the elements involved were at Lyallpur. The plaintiffs resided at all relevant times at Lyallpur and contracted in a special capacity that was localized at Lyallpur;[7] the defendants carried on business at Lyallpur through a local general manager; the debt arose at Lyallpur, and the place of performance also was Lyallpur. The court, therefore, on these facts came to the conclusion that the elements of the contract out of which the debt arose "were most densely grouped at Lyallpur and that this was its natural seat and the place with which the transaction had its closest and most real connection. It follows from this, that the 'proper law of the contract' in so far as this is material is Lyallpur law."[8]

By applying the English *lex situs* theory, the court came to the same conclusion, i.e., that the law of Lyallpur governs the case. The court said "that a debt is property, is we think clear. It is a chose in action and is heritable and is treated as property in India under the Transfer of Property Act,[9] which calls it an 'actionable claim': Sections 3 and 130".[10] Proceeding with the analogy of the transaction out of which the debt arose to a current account, the court concluded that since there must be a demand where the account is kept or where the deposit is made and kept before the bank could be made

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[5] Joachimson v. Swiss Bank Corporation, [1921] 3 K. B. 110; Bank of Travancore v. Dhrit Ram, (1942) 2 M. L. J. 256; (1941) L. R. 69 I. A. 1 at 8 and 9 (P. C.)

[6] The court pointed out that in England the courts have generally followed the *'lex situs'* theory; see New York Life Insurance Company v. Public Trustee, [1924] 2 Ch. 101 at 119; Mount Albert Borough Council v. Australian Temperance etc. Society, [1938] A. C. 201 at 219, while Cheshire prefers the 'proper law' theory.

[7] The plaintiffs were "Government nominees" for Lyallpur. The government of Punjab had restricted sales of cloth, and it could not be sold to any one except "Government nominees."

[8] (1955) S. C. J. at 652. It could also be added that the case dealt more with a question of performance rather than essential validity, and "non-performance should be excused, when it is rendered impossible by the law of the place of performance, just as delay in the time for performance is excused when authorized by the moratory legislation at that place." Goodrich, Conflict of Laws (1949) at 346. Under the law of Lyallpur, however, the defendants were discharged from liability because of payment to the Custodian.

[9] The Transfer of Property Act, Act IV of 1882.

[10] (1955) S. C. J. at 652.

liable to pay, the situs of the debt is where the account is kept and where the demand is required to be made.

Since, however, the debt arose at Lyallpur and was payable there and the residence and possibly the domicile of the debtor at the time of assignment were also at Lyallpur, there could be no dispute over the court's conclusion that the situs of the debt was at Lyallpur. This again attracts the application of the law of Lyallpur. Even under the bankruptcy analogy, according to both the English[11] as well as the American law,[12] despite overriding considerations of public policy in favor of local creditors, a transfer to the trustee (and the Custodian was more or less in the same position) would be recognized. Both under the English doctrine of universality and the American doctrine of territoriality, the result for the purposes of the present case would have been the same.

The plaintiffs also argued that, since the original transaction out of which the debt arose took place at Lyallpur when Lyallpur was still a part of India, the law applicable to the issue should be the law of the time when the primary obligation arose. The court rejected the contention, pointing out that the law applicable would be the law as a living and changing whole.[13]

As a last resort, the plaintiffs contended that the Pakistani ordinance was confiscatory and therefore against the public policy of the forum. This the court refused to accept because of the existence of similar legislation in India.

Exchange control laws preventing payment of a foreign debt create situations analogous to that arising in the present case. In *Kraus* v. *Zivnostenska Banka*,[14] a case arising out of exchange control problems, the plaintiffs had deposited with the defendant bank in Czechoslovakia certain funds and securities. In an action for the recovery of the funds, the defendant pleaded that they were prevented from making any payment without a permit from the foreign exchange control authorities. As in the *Delhi Cloth and the General Mills Co.'s Case*, the New York court found that most of the contacts were densely grouped in Czechoslovakia, which was the place of performance as well as the place of contracting. The public policy argument was stronger in the *Kraus* case, and yet the New York court accepted the defence of the exchange control laws. Some American decisions dealing with the problem of

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[11] Cheshire, Private International Law (1952) at 481.

[12] Stumberg, Principles of Conflict of Laws (1951) at 459.

[13] F. A. Mann, "The Time Element in Conflict of Laws," 31 Brit. Y. B. Int'l. L. (1954) at 232:

"It is the function of the conflicts rule to localize a legal relationship and, for that purpose, to select one of consecutive localizing factors, but once this function has been discharged the country so selected makes its legal system as existing from time to time, including its transitional provisions, available for application."

[14] 187 Misc. 681, 64 N.Y.S. 2d 208, Sup. Ct. (1946).

exchange control have gone the other way but on the ground that the place of payment in those cases was somewhere in the United States.[15]

In *Holzer* v. *Deutsche Reichsbahn Gesellschaft*,[16] a German Jew who was dismissed under the Non-Aryan Laws of 1933 sued the company in New York for a breach of contract. Both the plaintiff and the defendant were German nationals, and the contract was made in Germany and to be performed there. The court said "under the decisions of this court and the Supreme Court of the United States the law of the country or the state where the contract was made and was to be performed by the citizens of that country or state governs." Although in this case the nationality of the parties was a relevant consideration, the main principle would seem to be that in the absence of public policy the court will give effect to decrees of foreign governments operating on obligations arising and to be performed there.[17]

Thus, the Supreme Court of India decided in favor of the defendants,[18] holding that "whether the proper law of the contract applies or the English law of the situs (theory) in a case of this kind, the defendant is exonerated because, the debt being 'property,' the ordinance divested the plaintiffs of ownership in it and vested the debt in the Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation."[19]

On the whole, the opinion of the court offers no indication of future conflicts trends in India.[20] Although the court indicated the two prevalent theories

[15] See Central Hanover Bank & Trust Co. v. Siemens, 15 F. Supp. 927 (S. D. N. Y. 1936) affd, 84 F. 2d 993; Glynn v. United Steel Corporation, 160 Misc. 405, 189 N.Y.S. 1037 (1935).

[16] 277 N.Y. 474 (1938).

[17] See Oetjen v. Central Leather Co. 246 U.S. 297 (1918): Ricaud v. American Metal Co., 246 U.S. 304 (1918); Wolfsohn v. Russian Socialist Federated Soviet Republics, 234 N.Y. 372, 128 N.E. 24 (1923); Salimoff v. Standard Oil Co., 262 N.Y. 71, 193 N.E. 897 (1934).

[18] An American case which came very close to the Delhi Cloth and General Mills Co.'s case but was disposed of on another ground was the case of Williams v. Bruffy, 96 U.S. 176 (1877). In this case the plaintiffs, who were residents of Virginia, sold in March 1861 certain goods to Mr. Bruffy since deceased and brought an action against his administrator. Mr. Bruffy was throughout a resident of Virginia. In 1861 at the beginning of the Civil War, the Confederate States, of which Virginia was a member, passed a law making it compulsory for every person to place all goods, chattels, credits, etc. due an enemy alien in the hands of a receiver and thereafter acquitting that person of all responsibility for the property thus handed over. As default was to be considered to be a high misdemeanor, the defendant's intestate paid over the money to the receiver of the Confederate States. But the court never reached the conflicts problem, and the decision went on the issue whether the Confederate States was a de facto government.

[19] (1955) S.C.J. at 657. In arriving at the conclusion, the court relied heavily on the following English cases which it said were similar to the present case; Foud Bishara Jabbour v. State of Israel, (1954) All E. R. 145; Arab Bank Ltd. v. Barclays Bank, L.R. [1954] A.C. 495, 529.

[20] Paras Diwan, "Involuntary Assignment of Debts in Private International Law," 19 S.C.J. (1956) at 80, "Besides the fact that the present decision decides the case—and in the result rightly—it is submitted that the judgment in Delhi Cloth Mills v. Harnam Singh is authority for nothing."

—one following the *'lex situs'* and the other the 'proper law' of the contract as applicable to debts, it is difficult to conclude that it adopted either the *'lex situs'* or the 'proper law' theory. Both the state of authority and the absence of any precedents had left the court free to formulate its own applicable choice of law rules. Yet the very localization of all elements involved at one place, namely, Lyallpur, dispensed with the necessity of a clear analysis and a preference for a definite choice of law rule.[21] Although the court considered the claim from the property aspect, its discussion of the case is couched in terms of its contractual aspect. After a discussion of the English theories, the court refused to adopt any of them. The language of the opinion indicates that the court was willing to adopt the substantial connection theory; "if driven to a choice we would prefer this way of stating the law," the court stated, but found it "unnecessary to make the choice here."[22] In view of the fact that this case dealt with the problem of involuntary assignment of debt,[23] one wonders whether the discussion of the theories of contract was necessary and, if so, whether it could not have been more detailed and illuminating. For example, no distinction is made between capacity, performance, essential validity, etc. The general conclusion of the court was that in England whatever the theory purported to be followed "the proper law is in fact applied." The court refused to be drawn into an acceptance of the *'lex situs'* theory;[24] though considering debt as property, the court observed that "to give it position in space is not easy because it is intangible and cannot have location except notionally and in order to give it national position, rules have to be framed along arbitrary lines."

Even the most cursory look at the opinion will disclose the full sway of English authorities over Indian thinking on problems of conflict of laws.[25]

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[21] The only definite conclusion that can be drawn from the opinion of the court is that it rejected the subjective intention theory and argued that intention should be ascertained objectively. See, T. S. Ram Rao, "Private International Law in India," 4 Indian Year-Book of International Affairs (1955) at 255.

[22] (1955) S.C.J. at 654.

[23] For garnishment, the court quoted Cheshire for the English rule but did not analyze it, and one does not know whether it upholds the applicability of the rule of the law of the place of payment. For a criticism of the place of payment theory, see Nussbaum, Money in the Law, National and International (1950) at 148.

[24] See the following comment in support of the *lex situs* theory in cases of involuntary assignment by *ad hoc* legislation in Zaphiriou, Transfer of Chattels in Private International Law (1956) at 118:

> "Such transfers by acts of states are generally thought to be on the borderline of public and private international law, and consequently the application of the lex situs is not merely the effect of the English conflict rule but is also based on a principle of public international law according to which a state has exclusive jurisdiction over property situated within its territory . . . ; furthermore it would be stressed that there is now a clear tendency to regulate the effect of foreign ad hoc legislation by the lex situs principle."

[25] For some comments on private international law in ancient India, see K. A. Nilkantha Shastri, "International Law and Relations in India," The Indian Year Book of International Affairs, Vol. I, (1952) p. 100–101. The two great systems that prevailed in India when the

During the British rule in India, the Privy Council being the highest court of appeal, its rulings and even *obiter dicta* were binding on all courts in India. Although in theory the Privy Council applied the conflicts rules of the court below, in practice it applied the English rules of private international law. It is, therefore, not surprising that English thinking and rules of private international law should be assimilated into the Indian system. But there were important exceptions to this process of assimilation, whenever provisions in Indian statutes introduced departures from the English rules of private international law.[26] Examples of this can be seen in the Indian Succession Act,[27] the Indian Evidence Act,[28] etc.

In the immediate post-independence period, it was generally hoped that Indian courts would in the future look beyond England for aid in developing independent rules of conflict of laws. In 1952, Sinha, J., said "It is therefore a serious question to be considered as to what rule of Private International law we are to follow in India. Hitherto we have invariably followed the English rules. . . . Many of the decisions as will be found are based on the fact that India at some time formed a dependent colony under the British Crown. Circumstances, however, have now altered, and in my opinion it is no longer incumbent upon us to follow the English rules, or for that matter any other rule excepting our own."[29] This was generally considered as indicative of the future of the conflicts field in India. In the present case, however, no recourse

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British took over the country were Hindu law and Muhammedan law. Although these two systems were primarily concerned with personal law, there were also provisions for matters like contracts, gifts etc. The High Courts Act of 1872 had laid down that in matters arising out of dealings between two natives in India their personal law should apply and in case of conflict the law of the defendant should prevail.

[26] In questions of proof of foreign law, the English rule is that knowledge of foreign law is not to be imputed to an English judge. Neither previous English judgments nor reference to textbooks are admissible. (Cheshire, Private International Law (1952) at 127–30.) But under Section 38 of the Indian Evidence Act: "When the court has to form an opinion as to a law of any country any statement of such law contained in a book purported to be printed or published under the authority of the government of such country contained in a book purporting to be a report of such rulings is relevant." Thus, while English courts cannot take judicial notice of foreign law in India, the court may directly refer to books on foreign law or foreign codes certified as above-mentioned. In matters of divorce, the Indian courts granted divorce merely on the grounds of residence and place of performance of marriage. The courts purported to do this under some enactments passed between 1861 and 1869. This being against the English principle of domiciliary jurisdiction, in Keys v. Keys the English Probate Court refused to recognise an Indian decree, and special legislation had to be passed to alleviate the hardship to persons who contracted marriages subsequent to such divorces. (Jethmalani, The Conflict of Laws (1955) at 161–2) Further instances of such deviations from the English law can also be seen in questions of domicile of minors, posthumous children, wife, etc. (see Indian Succession Act ss. 14, 15, etc).

[27] The Indian Succession Act, Act No. XXXIX of 1925.

[28] The Indian Evidence Act, Act I of 1872.

[29] Per Sinha J. in Indian and General Investment Trust Ltd. v. Sri Ramchandra Deo, Raja of Khaliknote, A.I.R. 1952, Cal., at 509.

was had to authorities outside of England,[30] though Australian and American decisions have figured in constitutional and other cases decided by the Supreme Court. It may, however, be pointed out that the present case did not call for a wider discussion, which might have had a different effect on the ultimate decision.

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[30] The opinion does make a reference to American views, but there is no direct reference to any cases or authors. It refers to American views through Cheshire, as for example when speaking of the substantial connection theory it says "Cheshire sets out the definition given by some American Courts at page 203 and adopts it." (1955) S.C.J. at 653.

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FRANCE: EFFECT OF SEIZURE OF "OLYMPIA" TRADE-MARK IN EASTERN GERMANY ON RIGHTS TO TRADE-MARK IN FRANCE—In line with established French and Swiss precedents, the Paris Court of Appeals has decided, contrary to the Austrian judgment analyzed in this Journal (volume V, no. 2, p. 281) that the seizure of a trade-mark in Eastern Germany by the Soviet occupation authorities has no effect on its use or assignment in a foreign country. Particularly, it does not affect nor invalidate the seizure or licensing of the trade-mark in France by the French Government under the war and postwar legislation respecting enemy property.

The German typewriter company "Olympia" had registered its trade-mark "Olympia" under German law and under the international trade-mark conventions. Long before the war, it had concluded an agency arrangement with a French distributor. That arrangement did not include licensing of the French outlet but made it the exclusive distributor and sales agent of Olympia typewriters in France. The French firm had sold thousands of these typewriters, and its wide publicity had made them a well-known brand in France prior to 1939.

Pursuant to the clauses of the Potsdam Agreements of 1945 concerning German war reparations, the French Government seized the trade-mark "Olympia" by a court order dated October 23, 1945, and transferred its use to a French retailer on June 24, 1949.

Meanwhile, namely, in 1945, the Soviet occupation authorities in Eastern Germany had apprehended the plant of the Olympia typewriter factory situated in Erfurt, a city in the Eastern occupation zone of Germany. When this factory later sold Olympia typewriters in France through a French company, the licensee of the French Government claimed these sales to be an infringement on the trade-mark rights transferred to him by the French Government.

In its decision of March 21, 1953,[1] supplemented by a later judgment of June 24, 1955,[2] the Court of Appeals of Paris decided in favor of the plaintiff on the following grounds: The German trade-mark being registered interna-

[1] Administration des Domaines c. Etablissement Sidney-Merlin, Gazette du Palais 1953.-I.269.

[2] Recueil Dalloz 1956, Jurisprudence, 202.

tionally is thereby protected in France. Consequently, its use in France is both a right and an asset in France, which, if belonging to an enemy, can properly be seized by the French Government and be transferred thereupon to a Government licensee. Moreover, the sales promotion and publicity of Olympia typewriters by the French sales agent during the prewar years had established the renown of this brand, thus building up a monetary value for the trade-mark for commercial operations in France. This is located in France and is separable from the trade-mark rights and assets acquired and located outside French territory. Hence, the use of the trade-mark in France can be seized in France and transferred to a licensee, whatever be the fate of the trade-mark in other countries.

The defendant had argued that the seizure of the German plant by the Soviet occupation authorities had included all trade-mark rights, because these are inseparable from the factory where the branded goods are produced, according to German trade-mark law. He claimed that no title for the use of the trade-mark could have been acquired after 1945 except with the consent of its then owner. The court rejected this thesis on the grounds that the seizure effected in Eastern Germany could only apprehend rights and assets located within the Soviet zone of occupation but would not extend to rights and assets outside its jurisdiction. The court thereby followed the established precedents to the effect that trade-mark rights acquired outside the territory of its original protection and enjoyed by other persons than the proprietor of the trade-mark constitute separate and separable rights, the future of which is not necessarily linked to what may happen to the original trade mark.

There were adduced two additional arguments in the statement of the commissioner intervening on the behalf of the French Government and as an *amicus curiae*, which arguments might be considered to some extent as *obiter dicta* of the court since the judges did not reject them.

One argument was to the effect that the original trade-mark, having been registered in prewar Germany, therefore enjoyed protection in the entire German territory. The rights to its use in German territory not within the Soviet zone of occupation did not fall under the jurisdiction of the Soviet authorities and had therefore survived the seizure of the plant in Eastern Germany in 1945. These "Western" rights were enemy rights which had still been in existence in 1949 when their use was licensed in France by the French authorities. This conclusion is in line with a decision of the Superior Court of Hamburg of May 21, 1950, which held that the trade-mark "Olympia" was still valid and protected in Western Germany even after the intervention of Soviet authorities in Eastern Germany.

The other point made by the commissioner of the Government was the following: The company which had operated the Erfurt plant until 1945 was owned by a German corporation domiciled in Western Germany. After the seizure of the plant by the Soviets, the holding company had transferred the domicile of the operating company to Wilhelmshafen in Western Germany and had this transfer registered in the commercial registries both of the Courts of

Erfurt and of Wilhelmshafen. It followed therefrom that even if the trade-mark was to be considered as being inseparable from the ownership of the user factory, it had become in 1950 a West German trade-mark and this Western mark was still alive when the French Government licensed its use in France under the laws respecting enemy assets.

It is interesting to note that more recently both the Erfurt and the Wilhelmshafen plants have produced Olympia typewriters and are selling them in France. But the case in the Paris Court was not concerned with the possibility of unfair competition between the two French distributors merchandising the West German and the East German Olympia typewriters, respectively.

The difference in the approaches to the problem by the French and the Austrian courts is evident. While the Austrian court considers that the rights to the use of a trade-mark belong to the owner thereof, who alone can grant a license, the French court feels that the use of a trade-mark in a foreign territory can become an asset by itself and is then separable from the rights of the owner as well as from the later history of the trade-mark. This latter thesis leads to the conclusion that a trade-mark could survive in a foreign market even after being extinguished in its home country. It also would lead to limiting the right of the owner to grant licenses in such foreign country when his trade-mark has become an independent asset of his sales agent. It is submitted that this approach appears to be rather illogical, because the right to a trade-mark seems to be monolithic, cannot be split, but must be transferred in its entirety only, since a license does not chip off pieces from the owner's rights but subjects such rights to a kind of a limited easement. However, the French approach certainly takes account of economic realities, when it holds that a trade-mark may acquire an independent life, and become a separate and separable asset, by its use in a foreign country.

There have been numerous court decisions in Europe on like and similar problems which are carefully and intelligently analyzed by Alois Troller in his *Internationale Zwangsverwertung und Expropriation von Immaterialgütern.* Clearly the fundamental question, from a "systematical point of view," is whether the seizure of a trade-mark apprehends the trade-mark itself or only the right to its use, such right being subject to contractual and compulsory licenses. It appears from Troller's detailed analysis of precedents that most of the celebrated cases in this field—like the ones on the liqueur "Chartreuse"—have a political flavor, so that the question whether the rights in a trade-mark are separable or unitary is decided very often not on the basis of legal theory or judicial reasoning but from the point of view of political expediency. That is why some courts will find that the seizure apprehends the whole trade-mark and the right to its use all over the world, while other courts hold the seizure to be an act of government which, by its very nature, cannot produce any legal effect outside of the jurisdiction of the government concerned. Therein may also lie the explanation for the rather puzzling fact that the same court of appeals which held that the trade-mark "Olympia" is protected in France even after the seizure of the Erfurt plant by the Soviet authorities in Eastern

Germany, also decided on another occasion that the expropriation of a Czech trade-mark by the Czech Government was a bar to the use of that trade-mark in France without a license from the Czech Government.

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GERMANY: RADIOISOTOPES; PATENT FOR GAMMA RAY TESTS—On June 16, 1953, the Cassation Senate (*Nichtigkeitssenat*) of the German Patent Office in Munich made an important decision[1] concerning the use of artificially produced gamma radiation,[2] which has already evoked some attention in the German publications dealing with atomic energy[3] and has been published in extenso in *Deutsches Atomenergierecht*.[4] Since the patentability of radioisotopes in particular, and of atomic energy in general, has also been under scrutiny in American legal publications,[5] the foregoing decision in this new field of law[6] is of current interest.

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The German patent in question was granted in 1938 under the number 767462. It is worth noting that the patent was on the secret list until the end of

[1] File No.: Ni I 91, 52.

[2] Gamma radiation may be produced either by naturally, or by artificially, radioactive isotopes. The latter are also called radioisotopes. The gamma rays are of very short wavelength, and because of their great penetrability they have been used to test matters for internal structures, defects, etc.

[3] "Radioaktive Isotope: Patentrecht," Die Atomwirtschaft. Düsseldorf: Handelsblatt, GmbH., I: 2, 86–7.

[4] Georg Erler and Hans Kruse (ed.), Deutsches Atomenergierecht. Göttingen: Otto Schwarz & Co., 1955. Erste Lieferung, März, 1956. K 521, 1–4.

[5] *Cf.* Dean C. Dunlavey, "Can artificially created isotopes of chemical elements be patented?" California Law Review (1954) 676–689. The subject of this article is very close to the problem that the German Patent Office faced.

B. Boskey, "Some Patent Aspects of Atomic Power Development," Law and Contemporary Problems (Winter issue, 1955) 113 ff; *Id.*, "Patents under the New Atomic Energy Act," 36 Journal of the Patent Office Society (1954) 867–82.

C. W. Ooms, "Some Suggestions Relating to Patent Revisions in Atomic Energy Legislation to Protect the Public Interest," Journal of the Patent Office Society (1956) 38 ff.

[6] A lawyer who wishes to understand the problems accompanying the use of nuclear energy will find it mandatory to study a few technical books dealing with these new phenomena. For rapid information on the current terms, an atomic dictionary would be sufficient, as for instance: United Nations, Department of Conference and General Series, Atomic Energy. Lake Success, 1948; or National Council Conference on Glossary Terms in Nuclear Science and Technology, A Glossary of Terms in Nuclear Science and Technology. New York: Society of Mechanical Engineers, 1955. In addition, there are an ever-increasing number of books on nuclear physics. Two may be mentioned which the reviewer has found very instructive and helpful in explanation of many aspects of atomic energy: Oswald Blackwood et al., An Outline of Atomic Physics. 3rd ed. New York: John Wiley & Sons, Inc., 1955, and Werner Heisenberg, Nuclear Physics. New York: Philosophical Library, Inc., 1953.

the war. In 1951, its validity was upheld under the Transfer Law (*Überleitungsgesetz*). The patent concerns a process (*Verfahren*) for examination without destruction of matters of all kinds by means of gamma rays emitted by one, or by a mixture of a few, artificially radioactive materials produced from chemical elements.

The plaintiff petitioned the court to have the patent annulled. His arguments sought, first, to change the process patent into a product patent (*Sachpatent*). Second, he challenged the patentability of the teaching, claiming lack of novelty even at the time when the patent was granted, and also questioned whether the patent as compared with prior products has utility as claimed by the defendant. The supporting argument, which in many ways is quite interesting, may be resumed as follows: Since gamma rays (Quanta)—the plaintiff claimed—have no rest mass, they do not exist at rest. Thus it cannot be determined whether emitted gamma rays (Quanta) originate in a natural or in an artificially produced radioactive source (isotopes). He also pointed out the equivalence of X-rays to gamma rays in the physical sense, adding that the newest high voltage establishments would produce X-rays whose spectral energy distribution would include spectra of gamma radiation from either artificial or natural sources. This tended to prove the impossibility of determining from the spectrum whether the radiation emitted actually is very hard X-rays or gamma rays and whether it comes from natural or artificially radioactive isotopes. Therefore, the court was asked to change the formulation of the patent as relating to the use of radioactive material emitting gamma radiation rather than the method of examination by gamma rays; or as explicitly stated, the patent contested should be not a process patent but a product patent. Moreover, the only distinguishing feature of such protected products would be a requirement that they should be radioactive materials of one, or a mixture of a few, chemical elements. Hence, the plaintiff actually opposed granting a product patent of any kind for radioisotopes, claiming that the disclosure of the contested patent lacked the novelty of an invention and did not produce the alleged beneficial results, as compared with naturally radioactive isotopes and X-rays in prior use.

To support these contentions, reference was made to several books and articles published a few years before the patent was granted as showing that the invention claimed was then known. It should be noticed, however, that these writings dealt chiefly with control of materials by means of X-rays or gamma rays from naturally radioactive sources. It was also argued that the existing level of technical development and knowledge makes the use of radioisotopes in place of naturally radioactive materials obvious to an expert.

This thesis that gamma rays of radioisotopes can not be differentiated from naturally radioactive sources and X-rays, was generally opposed by the defendant. It was stressed that every nuclear disintegration produces radiation of a definite wavelength. By measuring this, the identity of the source of the gamma rays can be exactly established. Moreover, it was pointed out that

the energy distribution spectrum, which in the case of gamma rays is linear, offers a means of positive differentiation between X-rays and gamma radiation. Further, it was emphasized that the publications in question, mentioning examination of materials by means of transillumination before the patent was granted, concerned only X-rays and natural radiation. Finally, the argument from prior art in the use of X-rays and naturally radioactive isotopes, is refuted by the fact that the first reference to the use of radioisotopes for control of materials occurred in 1941, in an article published in the *Journal of Applied Physics* in the United States, while in Germany similar ideas were not aired in scientific publications until 1944. It should be recalled that the patent had been on the secret list.

The court rejected the petition and upheld the patent on the following grounds: (1) It is immaterial whether the patent is formulated as a process patent or as a product patent as the plaintiff demanded, since gamma rays necessarily presume radioactive matter. (2) There was no lack of novelty, as the antecedent literature chiefly concerned testing materials by means of X-rays, in some cases with inconclusive references to natural radioactive materials; hence, the argument that the use of radioisotopes was an obvious extension of prior art was not substantiated. (3) In view of the greater power of transillumination provided by radioisotopes and other technical and economic advantages, as compared with natural isotopes and X-rays, it was held that the patent claim disclosed a substantial technical advance constituting an invention, which was definitely patentable.

However, the patent was limited in one respect. The Cassation Senate noted that the patent claims embraced testing all kinds of matter, logically including living human bodies. As any monopolization in this field by means of a purely technical patent would be *contra bonos mores*, the patent was declared invalid in this specific respect.

The decision obviously grants far-reaching protection to the patent. It covers, not a specific radioisotope, but the use of gamma radiation from any artificially produced radioactive matter to test any material, except human bodies. This concept obviously goes much further than the opinion that radioisotopes are individually patentable, each artificial radioactive isotope presenting a particular patent problem.[7] However, it remains to be seen whether the projected German Atomic Law, which has been in preparation for some time, may not affect the extensive scope of the patent in question.

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[7] *Cf.* Dunlavey, *loc. cit.*, p. 676, Note 1.

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ITALY: FOREIGN EXPROPRIATION AND PUBLIC ORDER—There appear to be indications of greater readiness today on the part of judicial tribunals to "sit in judgment on the acts of the government of another, done within its own

territory".[1] Our own courts, in *Zwack v. Kraus Bros.*,[2] refused to give recognition to "confiscation of firm ownership" in Hungary, on the ground that it would indirectly result in the expropriation of assets in the United States.

A recent decision of the Court of Appeal of Bologna, Italy, is to the same effect. The case of *Svit Nsrodin Padnik & Bata A.S. v. Societa B.S.F. Stiftung and others*[3] turned upon the effect to be given by the courts of Italy to a Czechoslovakian decree of nationalization which purportedly covered the well-known *Bata* Enterprises and *Veca*, one of its subsidiaries in Italy. The court announced that, following the principles of private international law, it would apply the Czechoslovakian law, if not contrary to public order, and, in turn, it declared that the public order, which fixes the limits to the extra-territorial validity of the foreign law, is to be understood in the sense of *international* public order.

According to this principle, the court was prepared to give effect to the expropriation measures of the Czechoslovakian Government as they might relate to property located in Italy, provided, however, that the expropriation took place against a payment of fair compensation. In this particular case it was found that the Czechoslovakian law relegated the question of payment and of valuation solely to the discretion of the administrative authority in Czechoslovakia. This was held to lack proper standards which could protect an owner from political and other discrimination and, therefore, reduced the measure to an act of real and pure confiscation. Accordingly, the court held that the act of nationalization was "unable to produce" "a transfer of the ownership" of property located in Italy.

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[1] Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83 (1897), which furthered the act-of-state concept by refusing to pass upon measures of a foreign government valid within its own territory.

[2] 237 Fed. 2d (U.S.Ct. of Appeals for 2nd Circuit, October, 1956) 255.

[3] April, 1956.

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Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Anderson v. British Overseas Airways Corp., 144 F. Supp. 543 (S.D.N.Y. July 23, 1956): action arising out of airplane crash over Mediterranean; defendant manufacturer (de Havilland Aircraft Co., Ltd.) as co-subsidiary of common British parent.

Abrikossoff v. Brownell, 145 F. Supp. 18: residence since 1916 in Japan of officer of Czarist Embassy and later assistant to White Russian refugees in Japan; "enemy" within sec. 2 Trading with the Enemy Act.

American Pacific Dairy Products v. Siciliano, 235 F. 2d 74 (Ninth Cir. June 20, 1956): application of Guam Uniform Partnership Act to joint ventures; Civ. Code Guam §§ 2395–2472.

American Smelting & Refining Company v. Philippine Air Lines, 1 N.Y. 2d 866, 153 N.Y.S. 2d 900 (N.Y. June 8, 1956): Warsaw Convention on air waybill covering transport of gold bars from California to Hongkong; international character of trip; aircraft crash near Hongkong.

Antonio Roig Sucrs, S. En C. v. Sugar Board of Puerto Rico, 235 F. 2d 347 (First Cir. July 17, 1956): Sugar Act of Puerto Rico, Laws 1951 No. 526; "customs and historical pattern of the sugar industry in Puerto Rico."

Arcaya v. Paez, 145 F. Supp. 464 (S.D.N.Y. Oct. 15, 1956): immunity from libel suit of Venezuelan N.Y. Consul General after his promotion to U. N. representative with rank of Envoy Extraordinary and Minister Plenipotentiary.

Argonaut Navigation Co. v. United States, 142 F. Supp. 489 (S.D.N.Y. June 29, 1956): claim of Canadian citizen, resident of Canada, for dunnage requisitioned in Okinawa and Japan.

Aria Impex Corp. v. Merchants Chemical Co., 136 N.Y.L.J. Oct. 26, 1956, 6 col. 3: delay of court action in view of taking depositions in foreign countries, including Communist China.

Atlantic Raw Materials v. Almarex Products, 154 N.Y.S. 2d 993 (May 3, 1956): transfer of money to Swiss accounts in Switzerland; attachment related to share of commissions.

Atlantic Steamer Supply Co. v. The Tradewind, 144 F. Supp. 408 (D. Maryland Aug. 7, 1956): steamship registered under Liberian Flag and owned by Liberian corporation; maritime lien under Ship Mortgage Act as amended.

Bachman v. Majias, 1 N.Y. 2d 575 (N.Y. July 11, 1956): custody under order of Puerto Rico divorce decree; Puerto Rican court orders in custody matters not recognized in New York.

Banez v. Boyd, 236 F. 2d 934 (Ninth Cir. Sept. 26, 1956): native of Philippines Islands as national of U. S., though Philippine Independence Act of 1934 required that he be treated as an alien for purpose of immigration laws.

Bantel v. Brownell, 234 F. 2d 692 (D.C. Cir. June 7, 1956): citizens and residents of Germany barred from recovery of remainder interest in spite of general license granted to German nationals effective Dec. 31, 1946.

Bazyk, Matter of, 136 N.Y.L.J. Sept. 18, 1956, 13 col. 3: distributees residing in Byelorussia, U. S. S. R.; service by publication.

Berner v. United Airlines, 2 Misc. 2d 260 (Jan. 30, 1956): Warsaw Convention applicable to airplane crash on plane of Australian corporation; intervention of Quantas Empire Aviation, Ltd.

John Block & Co. v. Dell Publishing Co., 136 N.Y.L.J. Oct. 17, 1956, 7 col. 5:

performance of exclusive sale agency in Ireland.

Bottieri v. Bottieri, 136 N.Y.L.J. Oct. 3, 1956, 10 col. 1: misunderstanding, in annulment action, of interpreter by reason of difference in Italian dialects.

Brownell v. Chase National Bank of the City of New York, 77 S. Ct. 116 (Sup. Ct. U. S., Nov. 19, 1956): proviso for seizure of German-owned property in J. Res. of Oct. 19, 1951, ending state of war between U. S. and Germany.

Brownell v. Rasmussen, 235 F. 2d 527 (D.C. Cir. June 14, 1956): exemption of Danish national from military service as bar to naturalization.

Brownell v. Union and New Haven Trust Company, 124 A. 2d 901 (Conn. July 24, 1956): distribution to German nationals residing in Germany; such property to be turned over by administrator to Custodian of Alien Property.

Bruni v. Dulles, 235 F. 2d 855 (D.C. Cir. July 26, 1956): expatriating of American citizen also national of Italy by joining armed services of Italy and voting in Italian political elections.

Byers v. United States, 141 F. Supp. 927 (Ct. Cl. July 12, 1956): benefits of Belgian community property law; question of new domicile by transfer to Belgium under military orders.

Burna v. United States, 142 F. Supp. 623 (E.D. Va. July 13, 1956): injury on Island of Okinawa, a foreign country within meaning of Federal Tort Claims Act.

Cold Metal Process Co. v. United Engineer & Foundry Co., 235 F. 2d 224 (Third Cir. Sept. 7, 1956): doctrine of contributory infringement of patent rights not applicable when occurring beyond territorial limits of United States.

Victor M. Calderon Co. v. Luckenbach Steamship Co., 154 N.Y.S. 2d 726 (City Ct. N.Y. June 4, 1956): transportation of olives from California to New York by way of Panama Canal as intercoastal shipment by water covered by Harter Act.

City Bank Farmers Trust Co. (Matter of Huga), 136 N.Y.L.J. Oct. 11, 1956, 6 col. 1: "disability" of Japanese nationals to exercise power of investment and administration of trust property.

Colepaugh v. Looney, 235 F. 2d 429 (Tenth Cir. Aug. 10, 1956): espionage by U. S. citizen who landed from German submarine in Maine in 1944; offense of unlawful belligerency; jurisdiction of Military Commission under Pres. Procl. No. 2561.

Crerar v. Commissioner of Internal Revenue, 26 T.C. No. 86 (Tax Court June 27, 1956): 1942 Tax Convention with Canada, as amended; application to income derived by U. S. citizen resident of Canada during 1952, from sources within U. S.

Cuozzo, in re naturalization, 235 Fed. 2d 184 (Third Cir. June 26, 1956): exemption of Italian citizen from military draft in 1950; denial of citizenship in spite of later service in military forces of U. S.

Danish v. Guardian Life Insurance Co. of America, 19 F.R.D. 235 (S.D.N.Y. July 23, 1956): recovery of proceeds of life policies on behalf of Polish beneficiaries; control of funds by National Bank of Poland; letters rogatory issued to Polish judicial authorities; value of such testimony because taken in police state matter for trier of facts to consider.

Detres v. Lions Building Corp., 234 F. 2d 596 (Seventh Cir. June 13, 1956): Puerto Rico as territory of U. S. within meaning of diversity section of federal code of civil procedure (history of administration of Puerto Rico, p. 597).

De Sairigne v. Gould, 136 N.Y.L.J. Sept. 6, 1956, 3 col. 3: French law applicable to drawing of check and giving it as gift.

Diaz-Albertini, In re D. Will, 153 N.Y.S. 2d 261 (Surr. Ct. May 17, 1956), aff'd 154 N.Y.S. 2d 422 (First Dep. June 19, 1956): commissions to take testimony of witnesses in England.

Dior v. Milton, 155 N.Y.S. 2d 443 (July 27, 1956), aff'd 156 N.Y.S. 2d 996 (Nov. 7, 1956): exploitation of designs of fashion houses in Paris,

France; piracy of style by "sketch service."

Dover Steamship Co., Petition of, 143 F. Supp. 738 (S.D.N.Y. July 25, 1956): alleged disqualification of arbitrator; no court removal before award was rendered; petition to direct N.V. Rotterdamsche Kolen Centrale to proceed to arbitration.

Dutch-American Merc. Corp. v. H. R. Jacoby, 136 N.Y.L.J. Nov. 21, 1956, 7 col. 1: stop-payment order of checks delivered from Argentina to New York for sale of English sterling.

Esterbrook Pen Co. v. San Juan F. Vilarino, 144 F. Supp. 309 (D. Puerto Rico Sept. 10, 1956): trademarks under laws of Puerto Rico; Fair Trade Act of Puerto Rico.

Establissements Edouard Materne, S.A. v. The S.S. Leerdam, 143 F. Supp. 367, (S.D.N.Y. July 19, 1956): damage to tinplates on shipment from Philadelphia to Antwerp, Belgium.

Fagawa v. Karimoto, Cir. Ct. First Judicial Cir. Territory of Hawaii, Nov. 2, 1956: Gen. License No. H-8 of Governor of Hawaii of Dec. 17, 1941; interest on blocked accounts of nationals of Japan in Sumitomo Bank of Hawaii in Dissolution.

Falcon Dam Constructors v. United States, 142 F. Supp. 902 (Ct. Cl. July 12, 1956): contract of Mexican corporation with Mexican government for construction of dams across Rio Grande River; Treaty between U. S. and Mexico of 1944, 59 Stat. 1219.

Feltrinelli, Estate of Antonella F., 136 N.Y.L.J. Nov. 23, 1956, 8 col. 4: establishment of will of Italian decedent pursuant to Italian law; usufruct of surviving parent of property of minor children under Italian law; termination of Italian guardianship; accounting proceedings in Superior Court of Milan, Italy.

Fidelis Fisheries v. Gustaf B. Thorden, 142 F. Supp. 798 (S.D.N.Y. June 28, 1956): damage to cargo of caviar on voyage from Stockholm, Sweden, to New York; certificates of weight issued by Russian government authorities.

First National Oil Corp. v. Arrieta, 2 Misc. 2d 225 (March 16, 1956): arbitration agreement in charterparty for transportation of molasses from Puerto Rico to Florida providing for arbitration in City of New York.

Fordau, Estate of Joseph F., 136 N.Y.L.J. Nov. 11, 1956, 8 col. 3: notice of appearance of member of N. Y. bar with residence and office in American Sector of West Berlin, Germany; payment for his services denied.

Frank Export-Import Corp. v. Elof Hansson, 136 N.Y.L.J. Nov. 8, 1956, 6 col. 7: sale of newsprint f.o.b. Bremen, Germany, and/or Antwerp, Belgium.

Gonzales, Estate of, 156 N.Y.S. 2d 28 (Aug. 29, 1956): proof of 1943 Philippine divorce decree in view of destruction of court records during American liberation of Manila from Japanese occupation.

Goodman v. Pan American World Airways, 136 N.Y.L.J. Oct. 3, 1956, 13 col. 7: Brazilian law as to wrongful death.

Grace Line v. Panama Canal Company, 143 F. Supp. 539 (S.D.N.Y. June 28, 1956): prescription of new tolls under Canal Zone Code; Treaty between U.S. and Great Britain of 1901, 32 Stat. 1903.

Grace Line v. United States, 144 F. Supp. 548 (S.D.N.Y. July 26, 1956): freight for shipment of ores from ports of South America.

Grattan v. Societa Cantoni, 2 Misc. 2d 861 (S. Ct. N.Y. April 6, 1956): commissions under contracts with Italian manufacturer of textiles.

Grossman, Matter of, 2 Misc. 2d 876 (S. Ct. N.Y. Jan. 16, 1956): inability to locate foreign legatees in Poland; stipulation with Consul General of Poland and Union of Soviet Socialist Republics.

Hanover Fire Insurance Co. v. Hidalgo, 144 F. Supp. 442 (D. Puerto Rico Sept. 27, 1956): question of sovereign's immunity not presented in action against Superintendent of Insurance of Commonwealth of Puerto Rico.

Henningsen v. Commissioner of Internal Revenue, 26 T.C. No. 64 (Tax Court June 13, 1956): bona fide residence in China in 1946 and 1947; China Trade Act corporation in Shanghai, China.

Horine v. Ethicon, Inc. 142 F. Supp. 282 (D.C. Ma. June 15, 1956): concept of "ausgegeben" of German patents (p. 288).

Ilyin v. Avon Publications, 144 F. Supp. 368 (S.D.N.Y. July 24, 1956): copyright infringement by English translation of Jean Cocteau's play "The Human Voice".

International Film Distribution Establishment v. Paramount Pictures Corp., 155 N.Y.S. 2d 767 (Aug. 3, 1956): damage for malicious prosecution of action in Italy; Italy not a common law jurisdiction; effect of sequestration order under Italian law.

Ionian Steamship Co. of Athens v. United Distillers of America, 236 F. 2d 78 (Fifth Cir. July 20, 1956): stranding in Dominican waters of ship owned by Greeks under Panamian flag; leaving Cuban port of refuge.

Istituto Cubano De Establizacion v. The S/S Rodestar, 143 F. Supp. 599 (S.D.N.Y. June 25, 1956): waiver of right to arbitration.

Jackson v. Taylor, 234 F. 2d 611 (Third Cir. May 31, 1956): court-martial in Korea in 1951 for murder of Korean woman.

James, In re, 152 N.Y.S. 2d 891 (June 6, 1956): Japanese national's testamentary power of appointment not to be exercised after vesting by Custodian of Alien Property of rights of life beneficiary.

Jones v. Jones, 136 N.Y.L.J. Sept. 28, 1956, 11 col. 5: no judicial notice of law of Connecticut with regard to validity of Mexican divorces.

Kadar, Estate of, 154 N.Y.S. 2d 280 (Surr. Ct. May 23, 1956): assets in U.S.A. of Hungarian decedent credited to Swiss lawyer "to avoid the possibility of future restrictions by the United States or control by the Hungarian Government".

Karfiol v. Sarlie, 136 N.Y.L.J. Oct. 1956, 6 col. 4: taking of deposition in France; procuring translations.

Lanman & Kemp-Barclay & Co. of Colombia v. Commissioner of Internal Revenue, 26 T.C. No. 72 (Tax Court June 19, 1956): Colombian tax law applicable to U. S. corporation doing business in Colombia; decisions of Supreme Court of Justice of Colombia involving patrimony; tax liability of American corporation.

I. Lasry & Sons v. K.L.M. Royal Dutch Airlines, 136 N.Y.L.J. Aug. 24, 1956, 3 col. 8: joint venture or agency with AMIS organization, French corporation for tours in Europe of student members.

Lavdas v. Holland, 235 F. 2d 955 (Third Cir. July 11, 1956): return to native Greece of deportee without fear of prosecution on account of political opinion; no qualification as "displaced person".

Lezos v. Landon, 235 F. 2d 581 (Ninth Cir. July 12, 1956): efforts of Greek national to obtain entry to Albania; deportation to Greece.

Lim Kwock Soon v. Brownell, 143 F. Supp. 388 (S.D. Texas July 19, 1956): marriage according to customs of China.

Lujan, In re L. Petition, 144 F. Supp. 150 (D. Guam Sept. 12, 1956): Mexican divorce obtained by resident of Philippines; Civil Code of Guam as largely adopted from California Code.

Maffia v. United States, 142 F. Supp. 891 (Ct. Cl. July 12, 1956): sale of tugs lying at Island of Malta by Foreign Liquidation Commissioner of State Dept.; delivery of title documents to original purchaser in Rome, Italy.

Mfrs. Caribu, Ltda. v. Molina Forwarding Co., 136 N.Y.L.J. Sept. 20, 1956, 7 col. 3: only interrogatories framed in Spanish to be put to witnesses.

Mascarin v. Holland, 143 F. Supp. 427 (E.D. Pa. July 17, 1956): deportation of Italian seamen to Italy without fear of persecution even though village of birth has become part of Yugoslavia.

Matson Navigation Company v. United States, 141 F. Supp. 929 (Ct. Cl. June

5, 1956): recovery for loss of vessels sunk by Japanese submarines shortly after Pearl Harbor attack.

Matura, In re M. Petition, 142 F. Supp. 749 (S.D.N.Y. May 14, 1956): divorce obtained in Juarez, Mexico, from Yugoslav wife, a resident of Yugoslavia.

Molgantwon Glassware Guild v. G. M. Humphrey, 236 F. 2d 670 (D.C.Cir. June 7, 1956): alleged unconstitutionality of reduction in duty rate on glassware pursuant to General Agreement on Tariffs and Trade (Geneva, 1947).

Mulero, Estate of, 143 F. Supp. 504 (D. Puerto Rico Sept. 5, 1956): estate of deceased individual not juridical person under laws of Puerto Rico, within meaning of Bankruptcy Act.

Nastasi v. Moore, 136 N.Y.L.J. Sept. 28, 1956, 6 col. 6: accounting of a Canadian corporation for development of mineral claims in Saskatchewan.

National Tea Company v. The Marseille, 142 F. Supp. 415 (S.D.N.Y. June 22, 1956): damage to goods shipped on French vessels from Mediterranean ports to Louisiana and Texas.

Nikanov v. Simon & Schuster, 144 F. Supp. 375 (S.D.N.Y. July 27, 1956): infringement of copyright on Russian alphabet chart and script for teaching Russian language; testimony of Russian expert and educator.

Nishikawa v. Dulles, 235 F. 2d 135 (Ninth Cir. June 18, 1956): entry in 1941 of dual national in Japanese army so voluntary as to be act of expatriation.

Noel v. Linea Aeropostal Venezolana, 144 F. Supp. 359 (S.D.N.Y. Aug. 22, 1956): airplane crash into ocean en route from New York to Caracas, Venezuela; application of Warsaw Convention, 49 Stat. 3000.

Nonsuco v. Commissioner of Internal Revenue 234 F. 2d 583 (Fourth Cir. June 5, 1956): Philippines, before its independence on July 4, 1946, a foreign country for purposes of excluding from gross income of Philippine corporations earnings derived from operation of vessels documented under laws of "foreign country".

N. Y. County Lawyers Ass'n v. Roel, 136 N.Y.L.J. Oct. 3, 1956, 7 col. 7: legal counsel on Mexican law by Mexican lawyer in New York given to laymen and preparation of papers for filing in Mexico amounts to unlawful practice.

Nusbaum v. United States, 144 F. Supp. 744 (S.D.N.Y. June 27, 1956): insurance by Belgian national in favor of brother, a resident of the U.S. who had disappeared.

Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y. May 24, 1956): damages resulting from raising water-level of Lake Ontario; personal service on Dominion of Canada.

Outwater v. Fred W. Miller, 153 N.Y.S. 2d 708 (May 3, 1956): import of bicycles manufactured in Great Britain.

Paquet v. United States, 236 F. 2d 203 (Ninth Cir. Aug. 23, 1956): use of Canadian passport at status investigation in Honolulu, Hawaii.

People v. Carcel, 2 Misc. 2d 827 (City Magistrate's Ct. N. Y. March 30, 1956): picketing of United Nations by persons calling for Puerto Rican independence; Headquarter Agreement of 1947 with United States, 61 Stat. 756.

Perez v. Brownell, 235 F. 2d 364 (Ninth Cir. July 12, 1956): loss of nationality by voting in political election in Mexico in 1946.

Prendergast v. Syracuse Baseball Club, 136 N.Y.L.J. Oct. 8, 1956, 6 col. 6: reserve clause in uniform baseball contracts for prevention of professional activities in Cuba.

Rabang v. Boyd, 234 F. 2d 904 (Ninth Cir. June 14, 1956): person born in Philippine Islands in 1910 who came to United States as national in 1930, an "alien" within Immigration and Nationality Act.

Ramos, Matter of Ulpiana R., 136 N.Y.L.J. Nov. 9, 1956, 15 col. 3: effect of Spanish court decree declaring persons dead; prior investigations on missing persons also made in Ar-

gentina and Mexico; intestate succession under law of Spain.

Rashap v. Brownell, E.D.N.Y. Civ. 14259, Nov. 14, 1956: arrangements for safekeeping of Swiss funds in United States; property belonging to Aramo-Stiftung, a foundation under the law of Liechtenstein.

Republic of China v. National Union Fire Insurance Co. of Pittsburg, Pa., 142 F. Supp. 551 (D. Ma. July 9, 1956): recovery on policies for loss of vessels sold by U. S. to China, when crews had taken possession of ships and defected to Communist China; request of U.S. to Britain to grant special order in council to permit suit in Singapore, without regard to sovereign immunity of Chinese Communist Government.

Rice Grower Assn. of California v. F. Carrera & Hno., 234 F. 2d 843 (First Cir. Aug. 6, 1956): contracts for delivery of rice to Puerto Rico buyers; shipments from San Francisco to Mayaguez, Puerto Rico, C.I.F. Mayaguez.

Richardson v. American President Lines, Ltd., 144 F. Supp. 641 (S.D.N.Y. July 26, 1956): injuries sustained by seaman in Japan.

Romero v. International Terminal Operating Co., 142 F. Supp. 570 (S.D.N.Y. June 15, 1956): Spanish law on compensation for injury of deck hand on Spanish vessel; assertion of claim to Spanish consul in New York.

Ross. v. Twentieth Century-Fox Corp., 236 F. 2d 632 (Ninth Cir. Aug. 23, 1956): accounting for distribution of motion picture rights ("The Robe") in "Canada and all other foreign territories" and "throughout the world."

Rottenari, Estate of, 155 N.Y.S. 2d 902 (Aug. 8, 1956): return of decedent to Hungary in 1938; no claim against bank accounts since death in 1944.

Schumer v. Guaranty Trust Co. of New York, 136 N.Y.L.J. Sept. 28, 1956, 6 col. 5: interpretation of applicable law of Holland.

Scott, In re S's Petition, 143 F. Supp. 175 (N.D. Cal. Aug. 8, 1956): recovery of wage deposit by seaman who deserted vessel at Auckland, New Zealand.

Sheng v. Barber, 25 U.S. Law Week 2161 (D. C. Cal. Sept. 28, 1956): deserters from Chinese Nationalist Airforce entitled to adjustment of status to lawful residents under sec. 6, Refugee Relief Act.

Shurbart v. Warden of the City Prison, 157 N.Y.S. 2d 219 (Nov. 8, 1956): extradition for violation of Laws of Puerto Rico, Act No. 26 of 1934, on delivery of check in spite of insufficient funds.

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Brownell, 145 F. Supp. 494 (D. Col. Oct. 10, 1956): intervening Swiss non-enemy shareholders protected against recapitalization of American corporation.

Spanish-American Skin Company v. The M.S. Ferngulf, 143 F. Supp. 345 (S.D.N.Y. July 26, 1956): sale of sheepskins in Nigeria; letter of credit payable through British and French Bank in Lagos, Nigeria, agent of Midland Bank, Ltd., of London, England.

State Street Trust Co. v. British Overseas Air Corp., 144 F. Supp. 241 (S.D.N.Y. Jan, 27, 1956): airplane accidents in Mediterranean Sea; British companies not amenable to process in state.

Stephen v. Zivnostenska Banka, 136 N.Y.L.J. Oct. 5, 1956, 7 vol. 4: change in status of Czechoslovakian Bank since August 2, 1956 not newly discovered evidence.

Taomina, In re T. Estate, 153 N.Y.S. 2d 250 (App. Div. Second Dep. June 25, 1956): recovery for airplane crash in New York in which Italian resident and citizen was killed; attorney in fact for widow and minors residing in Italy superseding public administrator.

Toho Bussan Kaisha v. American President Lines, 141 F. Supp. 783 (S.D.N.Y. March 6, 1956): examination of assistant manager of Japanese corporation directed in New York.

Tomljenovich's Will, In re, 154 N.Y.S. 2d 327 (Surr. Ct. Erie Cy. July 19,

1956): holographic will written in Croatian language; no judicial cognizance of meaning of foreign language to be proved as question of fact.

Troisi v. Troisi, 136 N.Y.L.J. Sept. 18, 1956, 7 col. 5: marriage at City Hall, Naples, Italy, to be followed up with religious ceremony.

Tropicales, S. A. v. Milora, 156 N.Y.S. 2d 942 (Oct. 11, 1956): legality under Cuban laws of gambling when conducted in casino licensed by Cuban government; enforcibility in Cuba of gambling debts.

United Nations Korean Reconstruction Agency v. Glass Prod. Methods, 143 F. Supp. 248 (S.D.N.Y. Aug. 3, 1956): application of International Organizations Immunities Act; compliance with federal venue statutes.

United States v. Balanovski, 236 F. 2d 298 (Second Cir. Aug. 14, 1956): tax liability of members of Argentine partnership for sale of goods to agency of Argentine government in Argentina.

United States v. Batchelor, 25 U. S. Law Week 2118 (U. S. Ct. Mil. App. Sept. 7, 1956): Korean War prisoner's voluntary unauthorized communication with his captors as violations of art. 104 and 105 Uniform Code.

United States v. 3,827 Coins, 144 F. Supp. 740 (D. Hawaii Oct. 3, 1956): judicial notice of first Constitution of Kingdom of Hawaii in 1840; status of Hawaii as sovereign nation until 1898; "Hapa Haueri" coin issued in 1847 as money of Kingdom of Hawaii.

United States ex rel. Paschalidis v. District Director, 143 F. Supp. 310 (S.D.N.Y. July 19, 1956): evidence as to actual conditions in Greece relating to physical persecution of native Turks and citizens of Greece; seaman-member of Federation of Greek Maritime Union to be deported to Greece.

United States ex rel. Fong Foo v. Shaughnessy, 234 F. 2d 715 (Second Cir. July 11, 1955): stay of deportation because of fear of physical persecution in Communist China of Chinese known to have allied himself with Formosa Government.

United States ex rel. Lee Ming Hon v. Shaughnessy, 142 F. Supp. 468 (S.D.N.Y. May 9, 1956): permission for deportee, Chinese deserter from vessel to land in Formosa.

United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. June 20, 1956): kidnapping from Mexico; Extradition Treaty of 1899; violation of international law left to consideration of political and executive branches of government (p. 523).

United States ex rel. Tom Man v. Shaughnessy, 142 F. Supp. 444 (S.D.N.Y. May 16, 1956): consent of Communist China Government necessary to deport alien Chinese to that country.

Von Tresckow v. Von Tresckow, 136 N.Y.L.J. Sept. 25, 1956, 7 col. 8: validity of divorce procured in Ecuador.

Wing, Matter of, 157 N.Y.S. 2d 333 (Nov. 29, 1956): adoption of a Muslim name.

I. A. Zachariassen & Co. v. United States, 141 F. Supp. 908 (Ct. Cl. June 5, 1956): compensation to owners of Finnish vessels for detention in 1918, in view of uncertainty of political situation in Russia and Finland.

Zwack v. Kraus Bros. & Co., 255 F. 2d 255 (Second Cir. Oct. 2, 1956): claims to U. S. trademarks of partnership confiscated in Hungary in 1948; no extraterritorial effect of foreign measures; Hungarian Government not indispensable party; certificates of Hungarian authorities on tax deficiencies.

Documents

EIGHTH HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

NOTE: The Eighth Session of the Conference on Private International Law[1] was held at the The Hague from October 3 to 24, 1956,[2] and was attended by delegates from Western Germany, Austria, Belgium, Denmark, Spain, Finland, France, Great Britain, Greece, Italy, Japan, Luxemburg, Norway, The Netherlands, Portugal, Sweden, Switzerland, and Turkey, as well as by observers from the United States and Yugoslavia. The Conference agreed upon four draft Conventions, which are reproduced below in English translation from the Final Act of the Conference, of October 24, 1956, in which the official French texts appear. The decisions of the Conference concerning its future work, "Les Décisions relatives aux Travaux Futurs de la Conférence," may be found on pages 9–10 of the Final Act, but are not here translated. While the suggestions of various interested persons have been incorporated in the translation of the Conventions here reproduced, special acknowledgment is due to Messrs. Kurt H. Nadelmann and Willis L. M. Reese, who participated in the Conference as observers of the United States Government. The former made a copy of the Final Act available and translated the Second Convention; the latter in conjunction with Dr. Charles Szladits provided the translation of the First Convention.

H.E.Y.

I

DRAFT CONVENTION ON THE LAW GOVERNING TRANSFER OF TITLE IN INTERNATIONAL SALES OF GOODS

The States signatory to the present Convention;

Desiring to establish common provisions concerning the law governing the transfer of title in international sales of goods;

Have resolved to conclude a Convention for this purpose and have agreed to the following provisions:

Article 1

The present Convention applies to international sales of goods. It does not apply to sales of securities, to sales of ships or of registered boats or aircraft, to sales upon judicial order or by way of execution. It applies to sales based on documents.

For the purposes of application hereof, contracts to deliver goods to be manufactured or produced are assimilated to sales, if the party who assumes delivery is to furnish the necessary raw materials for the manufacture or production.

The mere declaration of the parties, relative to the application of a law or the jurisdiction of a judge or arbitrator, is not sufficient to confer upon a sale international character in the sense of the first paragraph of this article.

[1] For the Seventh Session, see Documents, 1 Am. J. Comp. L. (1952) 275.

[2] The Eighth Session is noted at page 709 and commented upon at page 611 of this issue.

Article 2

The law governing the contract of sale determines as between the parties:

(1) the time to which the seller is entitled to the products and fruits of the goods sold,

(2) the time to which the seller bears the risks relating to the goods sold,

(3) the time to which the seller is entitled to damages relating to the goods sold,

(4) the validity of clauses reserving title to the goods in the seller.

Article 3

Subject to the provisions of Sections 4 and 5:

The transfer to the buyer of title to the goods sold with respect to all persons other than the parties to the contract of sale is governed by the internal law of the country where the goods were located at the time when a claim was made concerning them.

The buyer, however, retains a title which has been recognized as belonging to him by the internal law of one of the countries where the goods sold were previously located. Moreover, in the case of a sale based on documents where the documents represent the goods sold, the buyer retains a title which has been recognized as belonging to him by the internal law of the country where he received the documents.

Article 4

Whether the rights of an unpaid seller in the goods sold can be asserted against the creditors of the buyer, such as liens and the right to possession or ownership, particularly through an action of rescission or a clause of reservation of title, is governed by the internal law of the country where the goods sold were located at the time of the first claim or attachment concerning such goods.

In case of a sale based on documents where the documents represent the goods sold, whether the rights of an unpaid seller to such goods can be asserted against the creditors of the buyer is governed by the internal law of the country where the documents are located at the time when the first claim or attachment concerning them occurs.

Article 5

The rights which a buyer can assert against third persons who claim title or another real right in the goods sold are governed by the internal law of the country where the goods were located at the time of such claim.

The buyer, however, retains any rights which have been recognized as belonging to him by the internal law of the country where the goods sold were located at the time when he was put in possession.

In the case of a sale based on documents where the documents represent the goods sold, the buyer retains the rights which have been recognized as belonging to him by the internal law of the country where he received the documents, subject to the rights granted by the internal law of the country where the goods are located to third persons who are presently in possession of said goods.

Article 6

Except for the application of paragraphs 2 and 3 of the preceding article, goods sold which are in transit in the territory of a country, or outside the territory of the State, are considered to be located in the country from which they were sent.

Article 7

In each of the contracting States, the application of the law determined by the present Convention may be excluded on a ground of public policy (*ordre public*).

Article 8

The contracting States have agreed to incorporate the provisions of articles 1–7 of the present Convention in the national law of their respective countries.

Article 9

The present Convention does not affect Conventions concluded or which

may be concluded by the contracting States concerning the recognition and the effects of a bankruptcy declared in one of the States a party to such a Convention.

Article 10

At the time of the signature or ratification of the present Convention or at the time of adhesion, the contracting States may reserve the faculty:

(a) to restrict the application of article 3 to the rights of the buyer as against creditors of the seller, as well as to replace the words "at the time when a claim was made" by the words "at the time of a claim or an attachment";

(b) not to apply the provisions of article 5.

Article 11

The present Convention is open for the signature of the States represented at the Eighth Session of The Hague Conference on Private International Law.

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of The Netherlands.

A procès-verbal shall be made of every deposit of instruments of ratification, a duly certified copy whereof shall be transmitted, by diplomatic channels, to each of the signatory States.

Article 12

The present Convention shall enter into effect on the sixtieth day from the deposit of the fifth instrument of ratification contemplated by article 11, paragraph 2.

As respects each signatory State, subsequently ratifying the Convention, it shall enter into effect on the sixtieth day from the date of the deposit of its instrument of ratification.

Article 13

The present Convention applies as of course to the metropolitan territories of the contracting States.

If a contracting State desires extension hereof to all its other territories, or to those of its other territories for the international relations of which it provides, it shall notify its intention to such effect by a document which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit by diplomatic channels a duly certified copy thereof to each of the contracting States. The present Convention shall enter into effect for such territories on the sixtieth day after the date of the deposit of the act of notification above mentioned.

It is understood that the notification contemplated by paragraph 2 of the present article shall have effect only after the coming into force of the present Convention, pursuant to article 12, first paragraph.

Article 14

Any State not represented at the Eighth Session of The Hague Conference on Private International Law may adhere to the present Convention. A State desiring to adhere shall notify its intention by a document which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit by diplomatic channels a duly certified copy to each of the contracting States. The Convention shall enter into force for the adhering State on the sixtieth day after the date of the deposit of the act of adhesion.

It is understood that the deposit of the act of adhesion shall take effect only after the coming into force of the present Convention, pursuant to article 12, paragraph 1.

Article 15

The present Convention shall have a duration of five years starting from the date indicated in article 12, first paragraph, of the present Convention. This period shall commence to run from such date, even for States which shall have ratified it or adhered hereto subsequently.

The Convention shall be renewed tacitly every five years, in the absence of denunciation.

A denunciation must be notified, at least six months before the expiration of the period, to the Ministry of Foreign Affairs of The Netherlands, which shall give notice thereof to all the other contracting States.

The denunciation may be limited to the territories, or to certain of the territories, indicated in a notification made pursuant to article 13, paragraph 2.

The denunciation shall have effect only as respects the State which shall have given notice thereof. The Convention shall remain in effect for the other contracting States.

In witness whereof, the undersigned, duly authorized, have signed the present Convention.

Done at The Hague, the ————————, in a single copy, which shall be deposited in the archives of the Government of The Netherlands, and of which a duly certified copy shall be transmitted, by diplomatic channels, to each of the States represented at the Eighth Session of The Hague Conference on Private International Law, as well as to States adhering subsequently.

II

DRAFT CONVENTION ON THE JURISDICTION OF THE SELECTED FORUM IN THE CASE OF INTERNATIONAL SALES OF GOODS

The States signatory to the present Convention;

Desiring to establish common provisions concerning the effects of the designation of a contractual forum in the case of international sales of goods;

Have resolved to conclude a Convention for this purpose and have agreed to the following provisions:

Article 1

The present Convention applies to international sales of goods.

It does not apply to sales of securities, to sales of ships or of registered boats or aircraft, to sales upon judicial order. It applies to sales based on documents.

For the purposes of application hereof, contracts to deliver goods to be manufactured or produced are assimilated to sales, if the party who assumes delivery is to furnish the necessary raw materials for the manufacture or production.

The mere declaration of the parties, relative to the application of a law or the jurisdiction of a judge or arbitrator, is not sufficient to confer upon a sale international character in the sense of the first paragraph of this article.

Article 2

If the parties to a contract of sale expressly designate a court or courts of one of the contracting States as having jurisdiction to adjudicate disputes which have arisen or may arise from said contract between the contracting parties, the court thus designated shall have exclusive jurisdiction and any other court shall declare itself without jurisdiction, reservation made of the provisions of article 3.

When an oral sale includes designation of the forum, such designation is valid only if it has been expressed or confirmed by a declaration in writing by one of the parties or by a broker, without having been contested.

Article 3

However, if a defendant appears before a court of one of the contracting States which has no jurisdiction on account of the designation of a forum contemplated in article 2, but which its own law permits to assume jurisdiction, he shall be deemed to have accepted the jurisdiction of this court, unless he has appeared either to contest this jurisdiction, or to safeguard goods attached, or in danger of being attached, or to have an attachment removed.

Article 4

The provisions which precede do not constitute an obstacle to the jurisdiction of the courts of the contracting States for provisional or protective measures.

Article 5

A judgment rendered in one of the contracting States by any court with jurisdiction under article 2 or article 3 shall be recognized and declared executory, without review of the merits (*révision au fond*) in the other contracting States, if the following conditions are satisfied:

1. the parties have been duly cited, or represented, or declared in default in accordance with the law of the State where the judgment was rendered, and, in case of a judgment by default, the defaulting party has had knowledge of the complaint in sufficient time to defend;

2. the judgment has become res judicata (*chose jugée*) and is enforceable according to the law of the State where it was rendered;

3. it is not contrary to a judgment already rendered, on the same subject matter, between the same parties, by a jurisdiction of the State where it is invoked, which has become res judicata (*chose jugée*);

4. it contains nothing contrary to the public policy of the State where it is invoked.

5. in the opinion of the court to which the request is made, the judgment is not the result of a fraud which the foreign judge was not asked to adjudicate;

6. under the law of the State, where the judgment was rendered, the certified copy thereof which is produced satisfies the conditions necessary for its authenticity.

Article 6

When recognition and execution are refused definitively because the judgment does not fulfil the conditions set out under No. 1 of article 5, without fault on the part of the plaintiff, the agreement concerning jurisdiction contemplated in article 2 does not preclude the plaintiff from instituting a new suit for the same cause before the courts of the contracting State where recognition and enforcement of the judgment have been refused.

Article 7

The present Convention applies as of course to the metropolitan territories of the contracting States.

If a contracting State desires extension hereof to all its other territories or to those of its other territories for the international relations of which it provides, it shall notify its intention to such effect by a document which shall be deposited with the Ministry of Foreign Affairs of The Netherlands. The latter shall transmit, by diplomatic channels, a duly certified copy thereof to each of the contracting States.

Such declaration shall have effect as respects nonmetropolitan territories only in the relations between the State which shall have made it and the States which shall have declared acceptance thereof. The latter declaration shall be deposited with the Ministry of Foreign Affairs of The Netherlands, which shall transmit, by diplomatic channels, a duly certified copy to each of the contracting States.

Article 8

The Convention shall apply only to designations of forum made after its entry into effect.

Article 9

Each contracting State, on signing or ratifying the present Convention, or adhering hereto, may make reservation as respects the application of treaties on recognition and enforcement of foreign judgments in force with other States parties to the Convention.

Article 10

Each contracting State, on signing or ratifying the present Convention, or on

adhering hereto, may exclude from its field of application:

(a) contracts considered as noncommercial by its national law;

(b) contracts considered as installment sales by its national law.

Article 11

The present Convention is open for the signature of the States represented at the Eighth Session of the Conference of The Hague on Private International Law.

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of The Netherlands.

A procès-verbal shall be made of every deposit of instruments of ratification, a duly certified copy whereof shall be transmitted, by diplomatic channels, to each of the signatory States.

Article 12

The present Convention shall enter into effect on the sixtieth day from the deposit of the fifth instrument of ratification contemplated by article 11.

As respects each signatory State, subsequently ratifying the Convention, it shall enter into effect on the sixtieth day from the date of the deposit of its instrument of ratification.

In the hypothesis contemplated by article 7, paragraph 2, of the present Convention, it shall be applicable on the sixtieth day from the date of the deposit of the declaration of acceptance.

Article 13

Any State not represented at the Eighth Session of the Conference of The Hague on Private International Law, may adhere to the present Convention. A State desiring to adhere shall notify its intention by a document which shall be deposited with the Ministry of Foreign Affairs of The Netherlands. The latter shall transmit, by diplomatic channels, a duly certified copy to each of the contracting States. The Convention shall enter into effect, for the adhering State, on the sixtieth day from the date of the deposit of the act of adhesion.

The adhesion shall have effect only in the relations between the adhering State and the contracting States which shall have declared acceptance of such adhesion. Such declaration shall be deposited with the Ministry of Foreign Affairs of The Netherlands.

It is understood that deposit of the act of adhesion may take place only after the coming into force of the present Convention pursuant to article 12.

Article 14

The present Convention shall have a duration of five years starting from the date indicated in article 12 of the present Convention. This period shall commence to run from such date, even for States which shall have ratified or adhered hereto subsequently.

The Convention shall be renewed tacitly every five years, in the absence of denunciation.

The denunciation must be notified, at least six months before the expiration of the period, to the Ministry of Foreign Affairs of The Netherlands, which shall give notice thereof to all the other contracting States.

The denunciation may be limited to the territories or certain of the territories, indicated in a notification made pursuant to article 7, paragraph 2.

The denunciation shall take effect only as respects the State which shall have given notice thereof. The Convention shall remain in effect for the other contracting States.

In witness whereof, the undersigned, duly authorized, have signed the present Convention.

Done at The Hague, the ————————, in a single copy, which shall be deposited in the archives of the Government of The Netherlands, and of which a duly certified copy shall be transmitted, by diplomatic channels, to each of the States represented at the Eighth Session of the Conference of The Hague on Private International Law and to the States adhering subsequently.

III

DRAFT CONVENTION ON THE LAW APPLICABLE TO OBLIGATIONS TO SUPPORT MINOR CHILDREN

The States signatory to the present Convention;

Desiring to establish common provisions concerning the law applicable to obligations to support minor children;

Have resolved to conclude a Convention for this purpose and have agreed to the following provisions:

Article 1

The law of the habitual residence of the minor child determines whether, to what extent, and from whom the minor child may claim support.

In case of change of the habitual residence of the minor child, the law of the new habitual residence is applicable as of the moment when the change occurs.

Said law equally controls in ascertaining who is qualified to institute the action for support and what periods limit its institution.

By the term "minor child," is understood, for the purposes of the present Convention, any legitimate, not legitimate, or adopted minor child, not married and less than twenty-one years of age.

Article 2

In derogation of the provisions of article one each of the contracting States may declare its own law applicable, if

(a) the claim is made before an authority of such State,

(b) the person against whom support is claimed as well as the minor child have the nationality of such State, and

(c) the person against whom support is claimed has his habitual residence in such State.

Article 3

Contrary to the preceding provisions, the law designated by the national conflicts rules of the authority concerned is applicable, in case the law of the habitual residence of the minor child denies to him any right of support.

Article 4

The law declared applicable by the present Convention may be disregarded only if its application is manifestly incompatible with the public policy of the State to which the authority concerned pertains.

Article 5

The present Convention does not apply to relations concerning support between collaterals.

It governs only conflicts of laws respecting obligations of support. Decisions rendered in application of the present Convention shall not prejudice questions of filiation and of family relations between the debtor and the creditor.

Article 6

The Convention applies only to cases in which the law designated by article one is that of one of the contracting States.

Article 7

The present Convention is open for the signature of the States represented at the Eighth Session of the Conference of The Hague on Private International Law.

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of The Netherlands.

A procès-verbal shall be made of every deposit of instruments of ratification, a duly certified copy whereof shall be transmitted, by diplomatic channels, to each of the signatory States.

Article 8

The present Convention shall enter into effect on the sixtieth day from the deposit of the fourth instrument of ratification contemplated by article 7, paragraph 2.

As respects each signatory State, sub-

sequently ratifying, the Convention shall enter into effect on the sixtieth day from the date of the deposit of its instrument of ratification.

Article 9

The present Convention applies as of course to the metropolitan territories of the contracting States.

If a contracting State desires extension hereof to all its other territories or to those of its other territories for the international relations of which it provides, it shall notify its intention to such effect by a document which shall be deposited with the ministry of Foreign Affairs of The Netherlands. The latter shall transmit, by diplomatic channels, a duly certified copy thereof to each of the contracting States.

The Convention shall enter into effect for the relations between States, which shall not raise objection within six months from such communication, and the territory or territories the international relations of which are provided by the State in question, and for which notification shall have been made.

Article 10

Any State not represented at the Eighth Session of the Conference, may adhere to the present Convention, unless one or several States having ratified the Convention object thereto, within a period of six months dating from the communication made by The Netherlands Government of such adhesion. The adhesion shall be made in the manner contemplated by article 7, paragraph 2.

It is understood that adhesions may take place only after the coming into force of the present Convention, pursuant to article 8, first paragraph.

Article 11

Each contracting State, on signing or ratifying the present Convention, or on adhering hereto, may reserve its inapplicability to adopted minor children.

Article 12

The present Convention shall have a duration of five years starting from the date indicated in article 8, first paragraph, of the present Convention.

This period shall commence to run from such date, even for States which shall have ratified it or adhered hereto subsequently.

The Convention shall be renewed tacitly every five years, in the absence of denunciation.

The denunciation must be notified, at least six months before the expiration of the period, to the Ministry of Foreign Affairs of The Netherlands, which shall give notice thereof to all the other contracting States.

The denunciation may be limited to the territories or to certain of the territories, indicated in a notification made pursuant to article 9, paragraph 2.

The denunciation shall take effect only as respects the State which shall have given notice thereof. The Convention shall remain in effect for the other contracting States.

In witness whereof, the undersigned, duly authorized, have signed the present Convention.

Done at The Hague, the 24th of October 1956, in a single copy, which shall be deposited in the archives of the Government of The Netherlands, and of which a duly certified copy shall be transmitted, by diplomatic channels, to each of the States represented at the Eighth Session of the Conference of The Hague on Private International Law and to States adhering subsequently.

IV

DRAFT CONVENTION CONCERNING THE RECOGNITION AND ENFORCEMENT OF DECISIONS INVOLVING OBLIGATIONS TO SUPPORT MINOR CHILDREN

The States signatory to the present Convention;

Desiring to establish common provisions to regulate the recognition and enforcement of decisions involving obligations to support minor children;

Have resolved to conclude a Convention for this purpose and have agreed to the following provisions:

Article 1

The purpose of the present Convention is to ensure reciprocal recognition and execution, by the contracting States, of decisions rendered pursuant to petitions, international or internal in character, involving claims for support by a legitimate, not legitimate, or adopted minor child, not married and less than twenty-one years of age.

If the decision contains provisions on a matter other than the obligation of support, the effect of the Convention is limited to the latter.

The Convention does not apply to decisions concerning support between collaterals.

Article 2

Decisions rendered concerning support in one of the contracting States shall be recognized and declared executory, without review of the merits (*révision au fond*) in the other contracting states, if

1. the deciding authority had jurisdiction under the present Convention;

2. the respondent party was duly cited or represented in accordance with the law of the State to which the deciding authority pertains;

nevertheless, in case of decision by default, recognition and enforcement may be refused if, in view of the circumstances of the case, the executing authority deems that, without his fault, the defaulting party did not have knowledge of, or was not able to defend himself in, the proceeding;

3. the decision has become res judicata (*chose jugée*) in the State where it was rendered;

nevertheless, decisions which are provisionally enforceable and interlocutory measures, although subject to review, shall be declared executory by the executing authority if like decisions may be rendered and enforced in the State to which such authority pertains;

4. the decision is not contrary to a decision rendered on the same subject matter and between the same parties in the State where it is invoked;

recognition and enforcement may be refused if, before the decision was pronounced, the matter had been pending in the State where it is invoked;

5. the decision is not manifestly incompatible with the public policy of the State where it is invoked.

Article 3

For the purposes of the present Convention, the following authorities have jurisdiction to render decisions involving support:

1. the authorities of the State in the territory of which the party liable for support had his habitual residence at the moment when suit was instituted;

2. the authorities of the State in the territory of which the party entitled to support had his habitual residence at the moment when suit was instituted;

3. the authority to whose jurisdiction the party liable for support has submitted either expressly, or by pleading to the merits without reservations as respects the jurisdiction.

Article 4

A party who relies on a decision or who demands enforcement thereof must produce:

1. a transcript of the decision satisfying the conditions necessary for its authenticity;

2. documents serving to establish that the decision is executory;

3. in case of decision by default, an authentic copy of the process instituting the suit and documents serving to establish that such process has been duly served.

Article 5

Examination by the executing authority shall confine itself to the conditions contemplated in article 2 and the documents enumerated in article 4.

Article 6

The exequatur procedure is governed, insofar as the present Convention does not otherwise provide, by the law of the State to which the executing authority pertains.

Every decision declared executory has the same force and produces the same effects as if it issued from a competent authority of the State where enforcement is sought.

Article 7

If the decision of which enforcement is sought, has ordered support to be provided by periodical payments, enforcement shall be granted for both payments already due and future payments.

Article 8

The conditions established by the preceding articles respecting the recognition and enforcement of decisions contemplated by the present Convention, equally apply to decisions issuing from one of the authorities contemplated in article 3, modifying a condemnation relating to an obligation of support.

Article 9

A party granted free aid in court (*assistance judiciaire gratuite*) in the State where the decision has been rendered shall have the benefit thereof in the proceeding seeking enforcement of the decision.

In the proceedings contemplated by the present Convention, security for costs and damages (*cautio judicatum solvi*) has no place.

Documents submitted are exempt, in proceedings governed by the present Convention, from visa and legalization.

Article 10

The contracting States undertake to facilitate transfer of the amount of sums allowed on account of obligations to support minor children.

Article 11

No provision of the present Convention shall form an obstacle to the right of the party entitled to support to invoke any other provision applicable for the enforcement of decisions involving support, whether under the internal law of the country where the enforcing authority is located, or under the terms of another Convention in effect between the contracting States.

Article 12

The present Convention does not apply to decisions rendered before its entry into effect.

Article 13

Each contracting State shall indicate to the Government of The Netherlands the authorities with jurisdiction to render decisions involving support and to render foreign decisions executory.

The Government of The Netherlands shall bring such communications to the cognizance of the other contracting States.

Article 14

The present Convention applies as of course to the metropolitan territories of the contracting States.

If a contracting State desires extension hereof to all its other territories or to those of its other territories for the international relations of which it provides, it shall notify its intention to such effect by a document which shall be deposited with the Ministry of Foreign Affairs of The Netherlands. The latter shall transmit by diplomatic channels a duly certified copy thereof to each of the contracting States.

Such declaration shall have effect as respects nonmetropolitan territories only in the relations between the States which shall have made it and the States which shall have declared acceptance thereof. The latter declaration shall be deposited with the Ministry of Foreign Affairs of The Netherlands, which shall transmit, by diplomatic channels, a duly certified copy to each of the contracting States.

Article 15

The present Convention is open for the signature of the States represented at the Eighth Session of the Conference of The Hague on Private International Law.

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of The Netherlands.

A procès-verbal shall be made of every deposit of instruments of ratification, a duly certified copy whereof shall be transmitted, by diplomatic channels, to each of the signatory States.

Article 16

The present Convention shall enter into effect on the sixtieth day from the deposit of the fourth instrument of ratification contemplated by article 15.

As respects each signatory State, subsequently ratifying the Convention, it shall enter into effect on the sixtieth day from the day of the deposit of its instrument of ratification.

In the hypothesis contemplated by article 14, paragraph 2, of the present Convention, it shall be applicable on the sixtieth day from the date of the deposit of the declaration of acceptance.

Article 17

Any State not represented at the Eighth Session of the Conference of The Hague on Private International Law, may adhere to the present Convention. A State desiring to adhere shall notify its intention by a document which shall be deposited with the Ministry of Foreign Affairs of The Netherlands. The latter shall transmit, by diplomatic channels, a duly certified copy to each of the contracting States.

The Convention shall enter into effect, between the adhering States and the State declaring acceptance of such adhesion, on the sixtieth day from the date of the deposit of the act of adhesion.

The adhesion shall have effect only in the relations between the adhering State and the contracting States which shall have declared acceptance of such adhesion. Such declaration shall be deposited with the Ministry of Foreign Affairs of The Netherlands; the latter shall transmit, by diplomatic channels, a duly certified copy to each of the contracting States.

It is understood that deposit of the act of adhesion may take place only after the coming into force of the present Convention pursuant to article 16.

Article 18

Each contracting State, on signing or ratifying the present Convention or on adhering thereto, may make a reservation as respects the recognition and execution of decisions rendered by an authority of another contracting State, which would have jurisdiction on the ground of the residence of the party entitled to support.

The State which resorts to such reservation may not assert the application of the Convention to decisions rendered by its authorities when these shall be competent on the ground of the residence of the party entitled to support.

Article 19

The present Convention shall have a duration of five years starting from the date indicated in article 16, first paragraph, of the present Convention. This period shall commence to run from such date, even for States which shall have ratified it or adhered hereto subsequently.

The Convention shall be renewed tacitly every five years, in the absence of denunciation.

The denunciation must be notified, at least six months before the expiration of the period, to the Ministry of Foreign Affairs of The Netherlands, which shall give notice thereof to all the other contracting States.

The denunciation may be limited to the territories or to certain of the territories, indicated in a notification made pursuant to article 14, paragraph 2.

The denunciation shall take effect only as respects the State which shall have given notice thereof. The Convention shall remain in effect for the other contracting States.

In witness whereof, the undersigned, duly authorized, have signed the present Convention.

Done at The Hague, the ————————, in a single copy, which shall be deposited in the archives of the Government of The Netherlands, and of which a duly certified copy shall be transmitted, by diplomatic channels, to each of the States represented at the Eighth Session of the Conference of The Hague on Private International Law as well as to States adhering subsequently.

Book Reviews

Recent Publications on Literary, Artistic, and Industrial Property

I. Copyright Law

In view of the steadily increasing number of countries which have ratified or are about to ratify the Universal Copyright Convention, it is not surprising that there have been numerous recent publications in this area which are of interest to the student and practitioner of comparative law, both here and in other countries.

Copyright Laws and Treaties of the World. Paris: United Nations Educational, Scientific and Cultural Organization. Washington: The Bureau of National Affairs, Inc. 1956. Pp. 2000. In this important work, jointly prepared by UNESCO, the United States Copyright Office, and the Industrial Property Department of the Board of Trade of the United Kingdom, the copyright laws and all the regulations of some 85 countries, and all international copyright conventions have been published for the first time in one convenient volume and produced in a loose-leaf format to permit the addition of new and replacement pages. While the price of the work is quite high ($97.50 per copy), this includes, except for a small additional charge, the annual supplements and replacement pages. It will be an indispensable working tool for copyright lawyers in all English-speaking countries.

Rothenberg, Stanley. *Copyright Law.* Basic and Related Materials. New York: Clark Boardman Co., Ltd., 1956. Pp. xxxiv, 1082. This work, too, is in the main a compilation of United States and international materials on copyright which have never before been covered in one volume, although much of the material on the Universal Copyright Convention and on the other international conventions had been previously published in Kupferman-Foner's *Universal Copyright Convention Analyzed* (New York, Federal Legal Publications, Inc., 1955). An extended bibliography on books and articles on copyright is attached to the volume, which also includes some selected federal and state cases. For the convenience of the practitioner, the text of patent and trademark laws is also included as is some general information published by the United States Government with regard to these laws and subjects.

From the reader's point of view, the most interesting part of the book is perhaps the introduction by Morris Ebenstein, which is less a conventional introduction to a book than an essay in law review style on the nature of copyright. Attention may also be called to a special article written by the author in conjunction with Mr. Ebenstein on the Universal Copyright Convention and Acoustic Works, at page 422.

Barker, R. E. *Books For All.* Paris: UNESCO, 1956. Pp. 102. *Copyright Laws and Treaties of the World*, mentioned above, is not the only recent publication for which UNESCO deserves credit. A still more recent publication is

this "study of international book trade" prepared by Mr. Barker, who is Deputy Secretary of the Publishers Association of Great Britain. There is gathered, for the first time, a mass of interesting factual materials on book publication and book selling all over the world. This valuable paper-bound book has chapters not only on trade barriers, trade patterns, etc., in the book business, but also a special chapter on copyright in books to which are added a number of original pictographs. Particularly valuable are the appendices to the work, giving a listing of all national and international associations of publishers, booksellers and libraries, as well as book exchange statistics, information on custom duties on books, and similar information.

Ransom, Harry. *The First Copyright Statute.* Austin: University of Texas Press, 1956. Pp. 145. This "essay on An Act for the Encouragement of Learning, 1710," recently published by the University of Texas Press, furnishes the most complete study to date of the origin and significance of the Statute of Anne. This is but one essay in a contemplated series of studies on the history of English and American copyright law. If subsequent volumes live up to the standards set by this one, then most legal historians, both here and in England, will have a great deal to look forward to in this series, which, it is planned, will include (I) the foundations of literary property in England, 1476–1710; (II) copyright controversies in England from 1710 to 1775; (III) English copyright from 1775 to 1950; and (IV) copyright in the United States from the colonial period to the present.

Neighboring Rights Documents. New York: The Copyright Society of the U. S. A. Translation Service, New York University Law Center, 1956. Unnumbered, with Supps. 1 and 2. This is a compilation of official documents of intergovernmental organizations concerning neighboring rights, covering the period June 1928 to the present. This subject is at present probably the most frequently discussed of all international copyright problems. The compilation was prepared for the benefit of the members of the Copyright Society of the U. S. A., especially for those who have subscribed to the special translation service, which covers important foreign language documents in the copyright field as well as outstanding articles published abroad.

Several unusually interesting works on copyright have recently been published in the German language.

Internationales Urheberrecht. Kommentar, by Drs. Walter Bappert and Egon Wagner. Munich-Berlin: Verlag C. H. Beck, 1956, pp. 362. This is an authoritative commentary in the German language on both the Berne Convention and the new Universal Copyright Convention. Contrary to the only other commentary thus far published in book form in the German language, Dr. Goldbaum's *Welturheberrechtsabkommen* (see below), the present work offers an entirely dispassionate and objective review of the numerous problems which have arisen and will arise under the two Conventions. Some of these problems are dealt with in even greater detail in an article just published by the same two authors

"Der Begriff der Veröffentlichung nach dem Welturheberrechtsabkommen," 22 Archiv. für Urheber- Film- Funk und Theaterrecht, nos. 5/6, 1956, p. 340. Both the article and the book point to the fact that the inclusion of a definition of "publication" for purposes of the Universal Copyright Convention will create many controversial problems, since it was included primarily for the purpose of accommodating the requirements of our own law, under which works perceivable only in audible form, such as phonograph records, are not considered "published," even if thousands of copies have been made generally available.

In addition to the two Conventions, the book includes a short review of all treaties which are presently in existence between the Federal Republic of Germany and other countries. This major contribution to the existing literature on the Universal Copyright Convention is in many respects the first effort toward the solution of some current problems in this field.

Much valuable material on the German performing right society and German copyright problems may be found in Erich Schulze's *Urheberrecht in der Musik und die deutsche Urheberrechtsgesellschaft*. Berlin: Walter de Gruyter & Co., 1956. Pp. viii, 463.

Written more for the layman, but quite enlightening also for lawyers, is H. G. Hauffe's *Der Künstler und sein Recht*. München: Verlag C. H. Beck, 1956. Pp. 334.

The controversial question of copyright in motion pictures is dealt with specifically in a scholarly Swiss study, entitled *Das Urheberrecht am Film*, by Peter Sutermeister, Basel, Verlag für Recht und Gesellschaft A. G., 1955. Pp. xii, 71. The *Archiv für Urheber-Film-Funk-und Theaterrecht* (Baden-Baden, Verlag für angewandte Wissenschaften) has undertaken to publish a series of monographs, of which the second, dealing with the new copyright law of Czechoslovakia, has just been published, *Das Urheberrechtsgesetz der Tschechoslowakei*, by Dr. Karel Knap, 1956. Pp. 63. This book is of particular interest in view of the fact that it is evidence of a significant effort being made even in an Iron Curtain country to protect authors to the maximum possible extent compatible with the prevailing political philosophy. The statute includes some rather broad provisions with regard to the protection of neighboring rights.

Disappointing, at least to the American reader, is the recently published commentary by Wenzel Goldbaum, *Welturheberrechtsabkommen*. Berlin: Verlag Franz Vahlen G.m.b.H., 1956. Pp. v, 118. Although attempting to present an "objective" commentary on the Universal Copyright Convention, Dr. Goldbaum, throughout the book, shows an undeservedly critical—if not hostile—attitude toward the United States and the part which our country played in bringing about the signing of the new Convention. Dr. Goldbaum does not hesitate to assert that some of our most distinguished copyright experts, such as, for instance, George D. Cary, the Principal Legal Adviser of the United States Copyright Office, has misconceived the new Convention and even our own law. Few people outside the jukebox industry in the United States have much to say in favor of the retention of the jukebox exemption in Section 1 (e)

of our statute, but to state that most of the three million dollar income from the jukeboxes goes to "Frank Costello and his affiliates" (p. 21) is hardly compatible with a dispassionate discussion of American copyright law. The emphasis (page 24) on the one or two lower court decisions which have taken the view that the manufacture of phonograph records constitutes "publication" under the United States law is another illustration of a certain lack of objectivity on the part of the author, since it is, of course, entirely clear that our Supreme Court and the vast majority of copyright experts have always taken the opposite view. There is no need to go into further detail here because some of the author's observations and criticisms have already been effectively answered by an outstanding American copyright expert in Sydney Kaye's "Die Ratifizierung des Welturheberrechtsabkommens in den Vereinigten Staaten von Amerika ist in jeder Hinsicht voll wirksam," published in Auslands- und Internationaler Teil von Gewerblicher Rechtsschutz und Urheberrecht, No. 12, December 1955, p. 539.

II. Trademarks and Unfair Competition

Perhaps the most significant event during the current period was the publication of the first issue of the *Industrial Property Quarterly* (Berne, International Bureau for the Protection of Industrial Property, No. 1 (July 1956). From the viewpoint of comparative law, the new publication in English is, of course, more than welcome, since it makes available to readers in English-speaking countries much interesting and important information on patents and trademarks which might otherwise not come to their attention. Thus far only two issues of the quarterly have come to hand but even these numbers include, among other things, newsletters from Great Britain, New Zealand, and Scandinavia which throw interesting sidelights on current developments in those countries. It is hoped that the new publication may have a long life and wide circulation.

The law of trademarks was greatly enriched by the publication a few months ago of the second edition of Dr. Harold Fox's *Canadian Law of Trade Marks*. (Toronto: The Carswell Company Limited, 1956. 2 Vols. Pp. lxxv, 1337). The increasing importance with which this subject is regarded in Canada is indicated by the fact that the new edition is about twice the size of the first; this is the first authentic interpretation of the new Canadian Trademark Act, of which the author was one of the draftsmen; indeed, he was for many years chairman of the Law Revision Committee which prepared what many consider the most modern and up-to-date trademark statute anywhere.

So far as the private law of unfair competition is concerned, two recent publications in the German language are particularly noteworthy. One of these is a study published by the Institut für Ausländisches und Internationales Patent-, Marken- und Urheberrecht bei der Universität München, entitled *Persönliche und Vergleichende Werbung in der Deutschen und Französischen Rechtsprechung*. The author, Dietrich Reimer, is the son of the distinguished President of the German Patent Office, Dr. Eduard Reimer, himself an eminent authority in this particular field. Of all recent studies in the field of comparative law proper, this

is perhaps the one that most certainly deserves to be characterized as a study of comparative law since the sole object of the book is to show the significant differences between the German and the French law on the subject of comparative advertising. There is unusually rich case material in this slender volume, and this material has been carefully annotated, analyzed and, in the real sense of the word, compared. This reviewer knows from his own teaching experience that nothing is more baffling to foreign lawyers than the carefree way in which even prominent manufacturers in the United States advertise their own wares by indirectly commenting upon or degrading the goods of others. Every few months, if not weeks, a foreign student will inquire why it is that a slogan such as "Bufferin works twice as fast as Aspirin" is permitted under our law, while in most European countries, such reference to a competitor's product would be considered unfair competition even though no particular trademark or competitor may be mentioned. In view of the fact that the law of unfair competition in the United States is still in its infancy in this particular phase, Dr. Reimer's study would merit considerable attention here.

Of considerable interest, also, to readers in this country is a study published in Switzerland by Dr. Hans Rudolf Sprüngli, *Der Unlautere Wettbewerb*. Zürich: Polygraphischer Verlag AG. 1955. Pp. XIX, 234. This study considers on a strictly comparative legal basis the fundamental principles of unfair competition in France, England, Germany, and Switzerland. This work was apparently a doctoral dissertation, but its contents, reference material, and treatment far exceed the scholastic standards usually found in dissertations of this kind. It can only be hoped that young scholars in the United States will show an equally thorough interest in comparing the basic principles of our own law with those prevailing in foreign countries.

This brief survey would indeed be incomplete without mentioning certain recent publications in the field of the public law of unfair competition, i.e., the area of restrictive trade practices, antitrust, cartel law, etc. Here the reviewer is pleased to call attention to the outstanding study recently published under the auspices of the University of Toronto and the editorship of Prof. Wolfgang Friedmann of Columbia University, *Anti-Trust Laws, a Comparative Symposium*. Toronto: The Carswell Company Limited, 1956. Pp. vi, 635. In this volume, there have been brought together articles on the present law of restrictive trade practices by leading experts not only in the United States but in the Scandinavian countries, Canada, England, and other countries as well. So far as the American reader is concerned, this may well be the first opportunity which has been afforded us to become acquainted with the far-reaching provisions of the Swedish and Norwegian Restrictive Practices Acts which, in connection with their registration requirements, actually go far beyond the provisions of our own antitrust laws. Denmark, too, has enacted similar legislation and, most recently, Great Britain has passed a Restrictive Practices Act.

While the British act, as finally enacted, could, of course, not be included in Professor Friedmann's symposium, there has been published "a guide for the industrialist" by the Federation of British Industries, London, *Restrictive Trade*

Practices Act 1956 (1956, pp. 56). What would seem to be particularly striking about the new British act is not the prohibition against collective vertical price fixing, but rather the recognition of the legality of resale price maintenance on an individual basis and the enforceability of such restrictions even against nonsigners. The passage of this legislation at a time when, one after another, our own state fair trade laws have been declared invalid at least with regard to enforceability against nonsigners, makes the reading of this most recent study particularly enlightening and certainly significant in the eyes of those who have been, and still are, proponents of fair trade legislation in the United States.

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Recent Literature on Copyright and Patent Law

Copyright Law Symposium. American Society of Composers, Authors and Publishers. New York: Columbia University Press, 1955. Pp. xii, 186.

This volume contains six essays submitted under the 1953 Nathan Burkan Memorial Competition sponsored by A.S.C.A.P. The first essay, "*Borderland—Where Copyright and Design Patent Meet*," by Richard W. Pogue was the winner of the national award and enjoyed the distinction of having been cited by Justice Reed in an opinion in connection with the subject of protecting artistic works serving a functional purpose. It analyzes the problems arising from the overlapping fields under the definitions of works of art according to the Copyright Law and ornamental designs according to the Patent Law. Protection of works of art falling in the borderland area is often prejudiced because of the definition difficulties. The problem becomes more important as more and more workaday objects incorporate aesthetic ideas. The author calls for legislation to remedy the statutory overlap so that full protection may be available in this field.

"*Fair Use in the Law of Copyright*" by Saul Cohen deals with the doctrine of fair use of copyrighted works without sanctions for infringing the copyright, as in the case of the right to quote from copyrighted works for purposes of criticism and comment. The author discusses the origin of the doctrine, reviews illustrative cases and various definitions, and examines the eight factors which courts weigh in determining whether a particular use is fair: type of use, intent, effect, labor exerted and benefit gained by the user, nature of copyrighted work, amount and relative value of material used. The author analyzes the difficulty in defining fair use and reaches the conclusion that a statutory definition appears to be impossible and that, consequently, proper application of the doctrine rests upon the wisdom and understanding of those on the bench.

"*Unesco: New Hope for International Copyright*" by Richard C. Seither deals with the need for an international copyright system and the role which UNESCO is to play in satisfying this need. It emphasizes the apparent conflict between the United States Copyright Law, which regards copyright merely as a privilege to be conferred in the public interest with such nonfunctional

provisions as the compulsory domestic manufacturing requirement, and the principle of the Universal Convention which is necessarily opposed to burdensome requirements as to formalities.

"*Moral Right and the Common Law: A Proposal*" by Arthur L. Stevenson, Jr. analyzes the moral right, as distinguished from copyright, as a legal concept and the extent to which it is protected in the United States. Moral right is enjoyed by authors independently of the copyright and without time restriction or procedural requirements; it consists of the right to create, the right of paternity, and the right to integrity. The question of how United States legislation might adopt measures for the protection of moral right is discussed and the essay concludes with the text of a suggested amendment to the United States Copyright Act.

"*State Regulation of Musical Copyright*" by John J. DeMarines analyzes the various statutory attempts by states to regulate, prohibit, or restrict such combinations as the A.S.C.A.P. and concludes that although the states undoubtedly possess police power to regulate combinations in restraint of trade, progress of science offering new means for providing music enhances the rights of authors and composers to protect their interests by means of combinations, which were not so important at earlier stages in the evolution of means of communication.

"*Hurn v. Oursler After Twenty Years*" by Frank L. Bixby reviews the evolution and fate of the principle laid down by the United States Supreme Court in 1933 in connection with the question: when should a federal court decide a nonfederal question (no diversity being present), such as unfair competition, when joined with a federal question, such as infringement of copyright. Although much liberalization has taken place since that time to facilitate courts in taking jurisdiction, confusion still persists.

REIMER, E. *Europäisierung des Patentrechts*. München: Carl Heymanns Verlag KG, 1955. Pp. xv, 305.

A universal patent system has long been the unfulfilled dream of patent interests, and although the present volume deals with the possibility of establishing a universal patent system on the European level only, its implication and significance would extend to the general problem of creating a universal patent system on a truly international level. The first part presents the difficulties arising from the diversity of national systems, which force the applicant to apply for patents separately in each country according to the different procedures and formal requirements and obtain different types of protection in each country. The author presents an excellent and clearcut analysis of the differences between various European national systems. Of particular interest to the American jurist is the comparative analysis of those features which are based on principles deviating from those accepted in the United States, such as the rights retained by an earlier bona fide user after the patent is granted to another (*Vorbenutzungsrecht*) and the compulsory license in the case of nonuser,

or the publication and opposition procedures adopted by those countries where examination for novelty by the patent office is not known.

In analyzing the conditions for patentability, the author remarks on page 18 that the American "Flash of Genius" theory is unknown in the European systems and cites in footnote the famous United States Supreme Court decisions in *Cuno Engineering Company* v. *Automatic Devices Corp.* and *Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corp.* which established the "Flash of Genius" concept. The reader will regretfully miss a reference at this point to Section 103 of the United States Patent Act of 1952, which abolished the "Flash of Genius" theory.

The second part describes and analyzes the role and co-ordination of the organizations which participate in the Europeanization activities, i.e. the Council of Ministers and Advisory Convention of the European Patent Council, the Bern Bureau for the Protection of Industrial Property, Committee of Experts of the European Patent Council, the national patent offices, industrial and professional, associations for the protection of industrial property, scientific institutions. The third part reviews the results achieved so far, with special emphasis on an international system of classification of patents. The fourth part covers future plans for Europeanization, such as the establishment of a European Patent Office and a European Court as the ultimate goal, and various intermediate plans, including those of the author. The fifth part contains a short general review of the past and future of the Europeanization effort and presents most interesting aspects of co-operation and exchange of patent examiners and jurists on international levels. The sixth part contains the texts of the various conventions and plans for a universal patent system.

Universal Copyright Convention Analyzed. Edited by R. Kupferman and M. Foner. New York: Federal Legal Publications, Inc., 1955. Pp. xvi, 668.

This volume presents the 1954 Symposium of the Copyright Institute of the Federal Bar Association of New York, New Jersey, and Connecticut. Special significance and importance is attached to this publication covering the Universal Copyright Convention in view of the fact that the United States ratified the Convention in 1954 and thus became a party for the first time to a system of universal copyright. Introductory material by Theodore R. Kupferman and Joseph A. McDonald is followed by the sectional analyses of the Convention. Articles I and II, dealing with the principle of National Treatment, are analyzed by Samual W. Tannenbaum. Article III on Formalities is analyzed by Abraham L. Kaminstein, with emphasis on the United States system which has often been accused of excessive formal requirements. Articles IV and VI dealing with the duration of the copyright protection and publication under the Convention, analyzed by Sydney M. Kaye, present the problems of reconciling varying philosophical viewpoints and different terminologies of the several countries. The analysis by Herman Finkelstein of Article V, dealing with the right of translation, contains a detailed discussion of the compulsory

license to authorize translations, which should be of particular interest in the United States where compulsory licenses as applied to patents are subject to a constitutional controversy. Articles VII, IX, X, XV, and XX covering limitations and negative features of the Convention, are presented by Alfred H. Wasserstrom. The sectional analyses are followed by discussions concerning legislation to conform the United States Copyright Code with provisions of the Universal Code and the effects of the Convention on existing treaties. The second part of the volume contains the text of the Convention in English, French, and Spanish, as well as other background material and texts of United States statutes with various legislative reports, texts of other international conventions, starting with the 1886 Bern Convention, and United States bilateral arrangements. A bibliography, table of cases, and topical index close the volume.

GEIGEL, H. *Patentfibel*. Weinheim/Bergstrasse: Verlag Chemie, 1955. Pp. 233.

Although labeled as a "Primer" and intended, according to the author, only for the unexperienced reader as a general source of information, this volume presents an excellent commentary and clearcut and logically arranged analysis of the Patent Law of the Federal Republic of Germany, in concise textbook form which will be welcomed by the jurist. The first part, covering patents, presents the essentials of the substantive patent law and application procedure, analyzes the extent of patent protection, and describes the various legal remedies. The second part offers the corresponding information with respect to the utility patents (*Gebrauchsmuster*), presenting an interesting picture of the advantages offered by the lesser, but cheaper, protection available for simple patentable objects (not including patentable processes) which could not bear the expensive and elaborate procedure of regular patents. An appendix with statutory material, classification list, and index closes the volume.

WENDT, H. *Warenzeichenfibel*. Weinheim/Bergstrasse: Verlag Chemie, 1954. Pp. 129.

Like its companion volume on patents, this "Trade Mark Primer" presents a clearcut, well-organized analysis of the Trade Mark law of the Federal Republic of Germany in concise textbook form. Statutory material is followed by the first part dealing with the description and acquisition of rights in regular trade marks as well as with the protection available for rights acquired without formal proceedings in certain display features (*Ausstattungsschutz*). The second part covers the subject of loss or cancellation of protection and court proceedings. An appendix including procedural material and the index closes the volume.

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LONG, M.—WEIL, P.—BRAIBANT, G. *Les Grands Arrêts de la Jurisprudence Administrative.* Paris: Sirey, 1956. Pp. vi, 407, (index) 18.

This is an important and most valuable book, calculated to be especially useful for those foreign students of the Conseil d'État whose legal education or experience has been in common law countries.

The authors have selected and brought together 114 noteworthy decisions of the Conseil d'État and of the Tribunal des Conflits. They reproduce, of each decision, only the relevant "*considérants*": which makes the judgment seem scarcely more than a headnote to lawyers accustomed to the interminable disquisitions of the English or the American courts; but they add to each report an illuminating commentary under the modest title "Observations." These "observations" begin with a statement of the relevant facts (often difficult enough to disinter in the actual reports) and thus provide a sufficient setting for a full appreciation of the scope and the point of the decision. The authors then set out concisely the rules or principles established by the decision and comment upon the course of their development by referring, again very concisely, to other decisions: the index shows that some 900 cases are cited. In some instances—e.g., upon the case of *Lemonnier* C.E. 26 July 1918—the commentary, though scarcely 5 pages, amounts to a restatement of so important a section of the contentieux administratif as "faute personnelle et faute de service." The authors occasionally permit themselves some adverse criticism—e.g., on the effect of delay, p. 189–190, in the note on *Benjamin* C.E. 19 May 1933—but they have deliberately avoided debate or the expression of personal opinion. The commentary shows in general the clarity and brevity of exposition and the directness which are marks of the Conseil d'État itself—indeed the book not only has the blessing of the Conseil d'État but almost some of its authority. Two of its authors are auditeurs au Conseil d'État closely connected with the newly formed "service de documentation" and the third, Professor Weil of the University of Aix-en-Provence, is a young man who has already greatly distinguished himself in the field of administrative law. Moreover, the book carries a preface under the joint names of the Vice-Président of the Conseil d'État himself, Monsieur R. Cassin, and of Professor Waline, the outstanding academic expert in administrative law in France, who announce it as the first in a series *Collection de droit public* to be published under their direction.

The skill and judgment of the authors and their advisers appear from the impression made by the book as a whole. Though of about 400 pages only, it succeeds in conveying a sense of the extraordinary wealth of the Conseil d'État's case-law, of the rapidity of its development, of its elasticity and audacity, of its ability to adapt itself to the ever-shifting administrative scene, of its readiness to take account of changes of policy and indeed of political climate and yet also of its resolute determination to require from the administrator a full and constant respect of the rights of individuals, who often enough are them-

selves civil servants. It is no doubt a mark of the Conseil d'État that it is as zealous of the rights of the fonctionnaire considered as an individual as it is of those of the administré.

To take an instance of change, the note on *Commerce en détail de Nevers* C.E. 30 May 1930 gives an excellent aperçu of the case law on trading by public authorities. The notes on *Delmotte* C.E. 6 Aug. 1915; *Gaz de Bordeaux* C.E. 30 March 1916, *Heyriès* C.E. 28 June 1918 and *Dames Dol et Laurent* (se disant filles galantes) C.E. 28 Feb. 1919 give a most concise and illuminating account of the "théorie de circonstances exceptionnelles" which, while protecting public authorities in the legitimate exercise of exorbitant powers necessary *ad hoc*, provide also a remedy for the individual unduly penalised by such circumstances: "imprévision" in the law of contract (which in the Conseil d'État's case law allows not merely of frustration but of an adjustment of liabilities) is but one of the consequences, and that by no means the most important, of this most comprehensive and genial doctrine. The notes also reveal the sometimes extreme and indeed perverse complexity of the case-law, particularly for example on the question of "compétence" as between judicial and administrative tribunals.

The title of the book invites comparison with Capitant's *Les Grands Arrêts de la Jurisprudence Civile*, of which the third edition by Julliot de la Morandière was published in 1950. Capitant is nearly twice as large and notes more than twice as many cases (240 to 114). The cases in Capitant are grouped together with reference to their subject matter and are divided into three parts, each part corresponding to one of the then three years course of study. The cases in our book are arranged purely chronologically. The advantage here is decisively with the Capitant, more especially as in our book the "Index alphabétique des Matières" is altogether insufficient and the impression is also conveyed to the reader that the "observations" on different cases dealing with the same subject-matter are not always entirely co-ordinated.

The comparison of the dates of the cases further emphasises the modernity as well as the amorphousness of administrative law, though it should be borne in mind that Capitant was first published in 1933. The earliest case in Capitant is in 1808, in our book the first is *Blanco* T.C. 8 Feb. 1873, and the case is probably of merely historical interest; there are only seven cases decided before 1900, whereas about one half of Capitant's cases are of the nineteenth century. Forty-five of the administrative cases (out of 114) are subsequent to 1940, there are only twelve such cases in Capitant (out of 240). Capitant gives no index of cases cited though not noted, our book does. Capitant normally gives reference in the notes to the current text-books, our book does not. On the other hand, our book gives reference to all the reports of the case noted and calls attention to those containing a commentary or the "conclusions" of the commissaire du gouvernement; Capitant normally contents himself with Dalloz and Sirey.

No doubt our book reflects the present intermediate state of the study in

France of the "contentieux administratif" as such. It is a *very* recent study and in academic circles does not date back beyond Hauriou. It has not yet mastered the techniques for dealing with case-law which are familiar to the "Anglo-American" lawyer—for example neither Waline nor de Laubadère (which are standard student text-books) contain a table of cases cited, either by name or by date though the Conseil d'État's law is almost exclusively case law, and the "tables de matière" in both text-books are summary and defective. The "Anglo-American" student may well have difficulty in using the book under review; he should not use it as his first book nor by itself. But it does provide him with a remarkable amount of extremely interesting material, and it is very useful as a companion volume, even though he may have to work out the cross-references on his own. Perhaps the most refreshing and intriguing quality of the book is the sense it conveys both of the great competence of the authors and of the extent and the immediacy of their knowledge: some of the cases cited are not yet reported. The reader will rightly feel that he is looking at the case law of the Conseil d'État as nearly as possible as it would be seen by a member of that body facing a problem today. This critical quality of the book can be maintained only by the issue of relatively frequent new editions.

It is a particular pleasure to this reviewer to note that in the preface the proposal of such a case-book is attributed to Professor René David, who is there, and properly, described as "maître de l'école comparatiste française."

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TUNC, A.-TUNC, S. *Le Système Constitutionnel des États-Unis d'Amérique*, avec une Préface de René David. Vol. 1, *Histoire Constitutionnel*; Vol. 2, *Le Système Constitutionnel Actuel*. Institut de Droit Comparé de l'Université de Paris. 4–5 Les Systèmes de Droit Contemporains. Paris: Editions Domat Montchrestien (1954). Pp. viii, 507, 542.

TUNC, A.-TUNC, S. *Le Droit des États-Unis d'Amérique. Sources et Techniques*. Institut de Droit Comparé de l'Université de Paris. 6 Les Systèmes de Droit Contemporains. Paris: Librairie Dalloz, 1955. Pp. 525.

Since the discovery of the New World, the American scene has attracted the attention of European observers as a proving ground of special comparative interest for the observation of institutions and ideas transplanted to a virgin continent. This interest was greatly intensified by the independence achieved by the colonists at an early stage in the revolutionary movement that has agitated Europe since the Eighteenth Century, and still more so by the establishment, in an age when monarchic authority was in vogue, of the United States of America as a democratic federal republic. The success of this new venture dedicated to government of, by, and for the people, promoting the exploitation of the fabulous resources of a continental domain and realizing a progressively affluent, classless polity, has belied the dismal prognostic of Macaulay that the Constitution is all sail and no anchor. The fact that in the

United States political power has been organized without tyrannical sacrifice of civil and human rights was the motive for Alexis de Tocqueville's celebrated survey of democracy in America; as he shrewdly remarked over a century ago, the results of the democratic revolution were achieved in the United States without suffering the revolution itself.

Thus, liberal aspirations have nurtured the continued European interest in the American constitutional system, lending special significance to the comprehensive account in the present work of the history and present evolution of this system and of the sources and techniques of law in the United States, which forms a notable addition, in three volumes, to the series *Les Systèmes de Droit Contemporains*. This ground of comparative interest in the subject matter should doubtless be added to the prudential considerations adduced in the Preface by Professor René David, by whom this series has been felicitously inspired, to explain the attraction of Anglo-American law for French jurists: the practical value of acquaintance with the laws of a major country with which the interests of France are traditionally, commercially, and politically bound; the relative accessibility of these laws in English; and the originality of the Common Law relative to the Civil Law.

The first volume is devoted to the constitutional history of the United States, which, after a short introduction, is treated in three chapters: the first on the colonial period, covering the formation of the thirteen colonies and the events leading to the Union, with a brief summary of the principal features of the Constitution; the second chapter, entitled *l'Expérience de l'Unité*, tracing the events of the succeeding century (1789–1876) during the "formative period" (1789–1829), the period of crises (1829–1860), and the era of Secession, Civil War, and Reconstruction (1861–1876); the third chapter on the modern period (1876–1952), after a section from the Reconstruction to the New Deal (1876–1932), terminating with a view of the New Deal and the Fair Deal (1933–1952). In the concluding pages of this volume, the authors epitomize the constitutional evolution of the United States in its present stage, as exhibiting extension of federal control of the national economy at the expense of the states, with attendant concentration of power in the presidency and the administration, an extension that has developed pragmatically and without destroying confidence in business enterprise. A bibliography of works cited by the names of the authors, a table of cases, a detailed index of subject matter, and a table of contents complete the book.

The second volume depicts the existing constitutional system of the United States, a theme told many times, but which, as the authors observe (p. 3), is probably one of the most difficult. The exposition is divided into four chapters corresponding to the quadripartite division of powers envisaged in the constitutional structure of the United States—legislative, executive, judicial, and administrative. These chapters are preceded by a "preliminary" chapter outlining the nature of the Union, federal and state citizenship, and the interrelations between the states and the Union in the federal system. In consonance

with this systematic approach, the first chapter includes three sections, relating respectively to the organization and functioning of the Congress, the federal powers of legislation, and the state legislatures. The succeeding chapter, which concerns the executive offices and the "*administration*" of the federal and state governments, underscores the increasing importance in the constitutional scheme of the President at the federal level and the governors within the States. The third chapter on the judicial power is relatively the most detailed; to this the authors devote 251 pages, or over half the volume. Here are included sections on the organization of the federal courts and their jurisdictional attributions, on the state judiciaries, on constitutional review of legislation, the "extrajudicial" powers of the courts (injunction, mandamus, contempt of court), on civil and criminal procedure, on the application of federal law in state courts and state law in federal courts and in the courts of other states, on the interstate effect of judgments, state or federal, in other courts, federal or state. The fourth chapter concludes the volume with a succinct account of the federal administrative agencies and the Administrative Procedure Act of 1946; in contrast to the preceding chapters, no parallel picture is given of the state agencies. A one-page conclusion raises—and *dubitante*, answers in the negative—the question whether the constitutional system of the United States will be soon unified. In addition to tables similar to those in the first volume, there is in an appendix a French translation of the text of the United States Constitution.

However valuable the description in the first two volumes of the development and present structure of the existing system of government in the United States, particularly for jurists in other countries, as a comprehensive guide to the complexities of the laws of a federal union of forty-eight states, fairly comparable to those of Western Europe, the analysis of the sources and techniques of the law—or rather laws—of the United States in the third volume will be of specific comparative interest for American jurists, not to speak of those in other countries. As indicated in the introduction to the volume, the purpose is to provide an understanding of the legal sources and techniques of the legal system of the United States, so that particular problems or branches of law can be intelligently studied by those trained in other legal systems. To accomplish this, the authors have not only had to examine the basic materials and methods of American law so as to define the general theory of the common-law system, but they have inevitably done so on a comparative basis that is inherently instructive.

Distinguishing the "real" sources and techniques of law, to which the first part is devoted, from the "formal" legal sources, which is to say, the legal materials, treated in the second part, the volume commences with an extensive chapter, constituting almost half its content, on the common law, which the authors with some justification regard as the central "real" source of law in the United States: the chapter includes sections on the history of the common law in both England and the United States; its fundamental principles—*stare decisis*, trial by jury, and supremacy of law; the different theories of the

authority of precedents, and their actual effects, followed by a fruitful comparison of the American, English, and French systems of precedent; and the theory of the common law of the United States, involving consideration of its supposed general features, the bases of judicial decision, and the theory of changes in judicial doctrine. The chapter concludes with a comparison of the American common law, the English common law, and the law of France; surveying the three systems in terms of certainty, adaptability to new conditions, volume of rules, their rigidity and logical structure, the tempo of change in the rules, and in particular the relative volume and complexity of the three systems, the authors evince an understandable preference for the law of France, principally on the grounds that it is less criticized and that codified law is superior to judge-made law on an impartial appraisal in the terms indicated.

This orderly and, from a theoretical viewpoint, illuminating analysis of the common law as the basic source of Anglo-American law is followed by chapters on legislation—general theories and interpretation; on "doctrine," including a brief account of legal education in the United States; and finally on the efforts to codify, clarify, improve, and unify the laws, touching in turn the codification movement, the uniform acts, the Restatement of the Law, the permanent law revision commissions, and the influences making for uniformity of law.

The second part of the volume provides a useful survey of the principal formal sources of American law, the reports, the different forms in which legislation appears, and the various doctrinal works, encyclopedias, texts, and legal reviews. In addition to tables similar to those in the preceding volumes, there are two appendices, the first a selected list of works on particular branches of law and the second a brief list of abbreviations.

It is not the province of this review to assess in detail a work, which, as the foregoing catalog of the contents may suggest, is of comprehensive scope. Indeed, the value of this important treatise for comparative understanding of the United States legal system has been promptly recognized; the authors have been awarded the first (and thus far the only) Comparative Law Prize of the American Association for the Comparative Study of Law, Inc., for their outstanding contribution and also have been granted the Prix Dupin l'Aîné by the Académie des Sciences Morales et Politiques, for the best work in Law published during the past three years. These awards are well deserved. The work under review, addressed to a vast subject matter that would dismay an American jurist, immersed in its complex variety, is a model of logical arrangement, clarity of exposition, attention to detail, comprehensive summation of the large literature, and sympathetic yet critical appreciation of each topic, that deserves a conspicuous place in the series of notable works on the constitutional system of the United States of America.

It will not disparage the merits of the authors' contribution to record certain general qualifications on this appraisal; anything like a detailed critique is obviously beyond the bounds of a review. In the first place, as indeed is avowed in the introduction to the first volume, the treatment of the sociological context

of which the law of the United States is an expression and an integral part—of the major currents of ideas, of the economic evolution of the country, of the influence of outstanding figures in the life of the law—is summary. While this was done to conserve space and indeed was desirable to simplify exposition, it has necessarily poised the survey at a less penetrating structural or ideological level than was the case, for example, in de Tocqueville's celebrated study, starting with the local institutions, of American democracy as a part of American culture. The present work is focussed on legal institutions and constitutional doctrines as such, regarded as facets of the federal scheme.

Within this legitimate perspective, in the second place, there must be limits. For example, despite the extensive studies and broad acquaintance with the laws of the United States to which this work testifies, there is some internal evidence that the researches undertaken were more or less restricted to the Atlantic seaboard and to Louisiana, without giving comparable attention to other parts of the country. This may be instanced, to give but a few illustrations, by the casual account of the significance of the Northwest Territory in the legal development of the country (the corresponding literature does not seem to be noted), by the suggestion (*Sources et Techniques*, p. 300) that American law faculties are "normally" connected with private universities, these being typically more numerous and important than those connected with state universities, "sauf à l'ouest des Rocheuses," (*ibid.*, 301), or by certain observations regarding the system of public education (*cf. Système constitutionnel actuel*, at p. 24) that obscure the extent to which, although state-regulated and state supported, it is basically localized.

In the third place, while the authors have given a picture of American law in which the details to a remarkable degree are fairly drawn, it is apparently predicated for the most part—which is but inevitable and appropriate—upon the results of current legal scholarship in the United States, including its limitations and aberrations, rather than upon first-hand observation. Obviously, the very magnitude and purpose of the undertaking made it necessary to rely chiefly on the existing literature and precluded the intensive type of investigation that de Tocqueville and Beaumont reported in their famous works over a century ago. But it is also obvious that to project the American legal scene in the manner and on the scale of this work, can scarcely avoid occasional *taches* that warrant corresponding caveat. Here again, an illustration or two must suffice. Thus, the valuable discussion of the problems involved in the interpretation of section 34 of the Judiciary Act (*Système constitutionnel actuel*, pp. 397, *et seq.*) appears—at least in the somewhat heterodox opinion of the reviewer—to offer a most interesting analysis of prevalent views on the matter, but without critical exploration of their premises, e.g., whether the doctrine of the "federal common law" in fact served to promote uniformity of commercial law—a question that has not been properly studied; what is the import of the grant of "judicial Power" in Article III of the Constitution, which has recently been placed in issue by Crosskey's massive work, etc. Likewise, the brusque

comment on the *McCartin* case (*ibid.*, p. 433) as illogical, without reference to the notable dissenting opinion of Mr. Justice Black in *Magnolia Petroleum Co. v. Hunt* (320 U. S. 430) and without indication of the typical localization of workmen's compensation among state administrative agencies, appears to rest on borrowed ammunition. Perhaps a final example may be allowed the reviewer (if only in view of his extraction) to suggest the caution with which even the most admirably executed enterprises should at times be regarded. This is the reference on page 13 of the first volume to "des communautés hollandaises hostiles à toute civilisation mécanique," which of course must refer to those indigenous to Pennsylvania—not Holland-Dutch! But while items such as these again suggest that large syntheses are liable to correction in detail, they do not distort essentials and indeed are of minor consequence as compared with the outstanding merits of the work, which it would be most useful to have translated into English.

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SCHWARTZ, B. *American Constitutional Law*. With a foreword by A. L. Goodhart. Cambridge: Cambridge University Press, 1955. Pp. xiv, 364.

While American constitutional law has inspired many good textbooks, Professor Schwartz' contribution to the field appears in two respects an original one, and of special interest to the comparatist.

The first original feature of the book lies in its division into two parts: one on the structure of the American constitutional system, another on certain modern developments. The first gives the machinery of American constitutional life—a machinery which could be termed "permanent" if it had not experienced an extensive evolution— the second is devoted to problems that are of peculiar interest today.

The classical part of the book appears as satisfactory as it could be within the scope of 160 pages. True, the treatment of the matter in Freund, Sutherland, Howe, and Brown's remarkable *Constitutional Law* covers a little more than ten times this number of pages, and a thorough study of American constitutional law cannot be expected within the space Professor Schwartz devoted to it. His purpose, however, was not to write a book for the use of the American lawyers or even, we may assume, for the use of American students interested only in American law. His book was intended for a foreigner, who will find in the first part a quite sufficient exposé of the American constitutional system.

The division of the matter within this part appears as simple and clear as desirable. A first chapter is devoted to "the bases of the American system": written constitution, judicial review, separation of powers, rule of law. A second concerns the "Federal system." The last three relate to the Congress, the President, and the Courts. Professor Schwartz has not forgotten that administration, including the great independent regulatory commissions, has often been termed the "fourth power": he chose, however, to consider these in the chapter dealing with the President.

The second part of the book, entitled "Modern Developments," deals in seven chapters with federalism, presidential prerogative and the Steel seizure case, the changing role of the Supreme Court, the Negro and the law, civil liberties and "Cold War," administrative law, the United States and the United Nations. All these topics seem well chosen in order to give a fair view of the present problems and the fields in which constitutional law has experienced recently the most interesting evolution.

The second basic and welcome feature of the book lies in its comparative character. The book is written mainly for British readers. The American constitutional institutions and procedures are considered in a British perspective, by a scholar brought up in the United States, but who has lived and studied in England. Such a comparative approach increases, of course, the interest of the book, not only for British, but for all non-American readers as well. Nothing is taken for granted, as in a purely national book; what is well known in the United States requires explanations for a foreigner. Eventually, the comparison is broadened to include glimpses at France. Such triangular comparisons are always very instructive. While Professor Goodhart, for instance, in his interesting foreword, defends the American Constitution before a British audience, by underlining the merits of a relative slowness of governmental action, the French audience will rather admire in American political life the relative speed of decision and the relative efficiency of the constitutional machinery. The only drawback of the method is the danger of too short statements on matters which require qualifications. To take an example, few French readers will recognize their country in that described by Professor Schwartz on page 8. They may be bewildered to learn that "the French experience shows that a constitution which cannot be enforced by the courts contains but empty words," and to have theirs described as a country where, "by failure of the French judiciary to assert a power of review over the constitutionality of acts of the legislature," the various constitutions have been "mere paper instruments," which seems to leave the citizen permanently threatened by a powerful legislature. Their surprise may increase when they see Dicey quoted against a leading French constitutionalist[1], while Dicey recognized that he had been mistaken on the subject. Considering the past, they usually think that the respectable number of constitutions under which they have lived since 1789 has nothing to do with judicial review. Considering the present, they feel that the disorder of their political life is sufficient to make further possibility of negative action from the judiciary undesirable, especially since the Conseil d'État, as Professor Schwartz perfectly knows, (*French Administrative Law and the Common Law World*, 1954) is a very effective guardian of liberties (see also: C. F. Hamson, *Executive Discretion and Judicial Control*, 1954) and, in the field of liberties, to a great extent plays, although in a quite different context, the role presently assumed in the United States by the Supreme Court. Thus, the American reader, finding

[1] It may have escaped Professor Schwartz, furthermore, that Professor Vedel was referring to *rigid* constitutions, not to *written* constitutions; the difference between rigid and written constitutions had been explained on p. 113 *et seq.*

on page 126 that the fate of France is a common one and that "most European constitutions" have been and are "mere paper instruments," may well wonder what is the peculiarity that pushes European countries to enact constitutions which are useless and why the French spend so much time in endeavors to amend their constitution so as to make their government more effective. The danger of such distortions is inherent in mere glimpses at a foreign system. A bare outline of judicial review in France and the machinery of government under law in France would require many more pages (we have tried to give such a short outline in Government under Law. A Civilian View, in *Government under Law*, Arthur E. Sutherland ed., 1956, p. 35 ff.). The book, however, derives real value from its comparative character.

The interest of the book is increased by the broad perspectives from which the matter is considered. The constitutional law described by Professor Schwartz is not a lawyers' law. It is a living law. Quite often remarks or judgments are expressed, which reflect a political scientist as much as a lawyer. The chapter on Congress could be given as an example. Quite often also, the "flash back" technique is used: the historical development is outlined in order to replace the present situation in its true perspective.

The only possible weakness of the book is a counterpart of the qualities which result from the author's conception. Being mainly an "introduction," it appears a little short on certain points, even on the American constitutional system. The States, for instance, are never considered in themselves; nothing is said of their organization, and little appears of their present role and their life in the chapters dealing with the federal system and the new federalism. The New Deal appears not quite as revolutionary as it has been, even though economic regulation is much older; its irreversible impact, not only on the national life, but on the national philosophy of life, does not appear as important as it is. More could be said on the independent regulatory commission, an institution unparalleled in the other countries. The relatively short treatment of such matters, however, deserves excuse. Again, the book does not pretend to be a treatise. Its purpose is to permit a foreigner to understand the general frame of American constitutional law and to give more specific information on the present problems. It certainly serves well its purpose.

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DEKKERS, R. *Précis de Droit Civil Belge*. Vol. I: Introduction—Les Personnes—Les Biens—La Transcription—La Prescription. Vol. II: Les Obligations—Les Preuves—Les Contrats—Les Sûretés. Vol. III: Les Régimes Matrimoniaux—Les Successions—Les Donations et Les Testaments. Bruxelles: Établissements Émile Bruylant, 1954–1955. Pp. 1002, 1059, 942.

In addition to the present work, the author, long known as one of the most distinguished Belgian lawyers, has written several volumes of the imposing *Traité élémentaire de droit civil belge*, edited by Mr. Henri de Page. More recently,

his *Le droit privé des peuples* has made a rich and original contribution to the philosophy and history of law, as well as to comparative law. As the title indicates, the *Précis de droit civil belge* is devoted to Belgian municipal law and is particularly intended for students. Nevertheless, it deserves the attention of lawyers of other countries, not only by reason of the personality of the author, or because Belgium is a country with great judicial traditions, but as a basis for comparison with French civil law.

While Belgium, like France, is governed by the Code Napoléon, French and Belgian civil law are by no means identical. The rules of 1804 no longer apply today; the Code has been considerably amended, and supplemented, by abundant special legislation, which is not the same for both countries. The Code also has been expanded by case law. The Belgian Court of Cassation has been no less creative than the French Court of Cassation; while mutual influence is not to be denied, their decisions frequently differ. The result is that today, the civil laws of France and Belgium are still near relatives, but often show important differences. For instance, the causes of divorce are no longer the same (divorce by mutual consent exists in Belgium, not in France), but the respective general principles of contract are very similar.

Hence, it would be of great interest to study the comparative evolutions of these two systems of private law, particularly since the reform of the civil and commercial codes is now under discussion in France. Professor Dekkers' work furnishes most valuable material for such comparison, and for this reason among others deserves to be read as much abroad as in Belgium.

The *Précis de droit civil belge* consists of a statement of positive law, which above all the author has wished to make clear. He has purposely minimized quotations from cases and books and abstained from reporting the many controversies, in order to stress accepted solutions, which he describes in precise and direct formulas. This does not prevent him from stating frequently his own views. To give a summary of this work thus would involve exposing the essentials of the whole private law of Belgium. This certainly is not a task for a Swiss lawyer, however interested he may be in Belgian law. Instead, comment on some questions is suggested, which may encourage the readers of this Journal to read the book itself:

In a short introduction dealing with the *sources of law* in Belgium, Mr. Dekkers does not hesitate to include judicial decisions. So would certainly many of his colleagues. Yet, in a recent textbook on French civil law, Professor Jean Carbonnier of the University of Poitiers, makes a distinction between sources of law and what he calls "authorities." Mr. Carbonnier regards judicial decisions as "authorities," a point of interest for "common lawyers." There is in fact no doubt that the binding effect of a judgment in France, Belgium, or Switzerland as a precedent is not equivalent to that of an English or an American judicial decision. It is suggested that the very difference between the civil-law systems and the common-law systems offers a good reason for the proposed distinction. There are examples of single precedents in the civil-law countries

with authority equal to that of statutory rules, but from a *purely theoretical point of view*, a single precedent cannot be regarded as a source of law, notwithstanding the almost equal practical importance of a judgment in the civil-law and in the common-law countries.

In treating the *law of persons*, the human being is defined as the only "true person" (*personnes véritables*, I. p. 44). In other words, the author adheres to the "fiction theory," according to which corporations are given the quality of subjects of law only by legal fiction. This is not the opinion of the majority of authors, who generally prefer the "reality theory" or the "institutional theory" of Hauriou and Renard, thus considering, to use Professor Dekkers' expression, corporations as "true persons," whose existence is recognized by the legislator.

Domicile presents a number of delicate questions. In Belgian law, as in Swiss law, the domicile of a person is where he resides with the intention of remaining for a certain time (*animus manendi*). The existence of a domicile depends on two conditions, one material, the fact of residing at a given place, one psychological, the intention to continue this residence for a certain time. The psychological condition is a source of great difficulties for the judge, and it is worth mentioning in this respect that the French Commission for Revision of the Civil Code has proposed in the draft already published to abolish the psychological element of domicile.

In dealing with marriage, the author condemns as useless and wrong the theory of the *mariage inexistant*, i.e., a marriage with such defects that the ordinary rules on nullity do not apply. Such marriages (e.g., marriages which were not celebrated before an *officer de l'état civil*; marriages between two persons of the same sex, etc.) have no legal effect. Mr. Dekkers defends the opinion that the rules on nullity of marriage always apply (I, p. 175), in company with several French authors, while in Switzerland the question is still controversial.

Mr. Dekkers regards the so-called "domestic powers" of a married woman (*Schlüsselgewalt*, *pouvoir des clés*) as deriving from a mandate by the husband to the wife. This opinion is excluded by article 163 of the Swiss Civil Code, which gives the wife a legal power of representation, independent of the husband's will. When she buys necessary food for the family, the Swiss woman exercises a power which she possesses according to law, while the Belgian woman thus seems subject to an expressed or implied authority of her husband.

As regards *property*, Mr. Dekkers rightly points out that the distinction between movables and immovables, which is of such importance in positive law, is open to criticism. The distinction presupposes "a state of law in which immovable is a synonym for a valuable, and movable for a negligible thing" (I, p. 483). Is it reasonable to submit the transfer of immovables to all sorts of solemn forms and restrictions, while today enormous wealth often is composed of movables only?

In the chapters on obligations, an interesting paragraph is concerned with *public policy*. "A law," writes Mr. Dekkers, "pertains to public policy when it concerns the essential interests of the collectivity" (II, p. 43). The notion of

public policy is relative, changeable, and has three degrees: internal public order, Belgian international public order, and the obligation of the public prosecutor to act *ex officio*.

No less interesting is the section on the *interpretation of contracts*, particularly the power of control of the Court of Cassation. As a rule, the interpretation of a contract is a question of fact, which cannot be made the object of an appeal to the Belgian supreme court. The Court of Cassation nevertheless has power to control two points: the legal qualification of the facts determined by judges of first instance, and their respect for the agreement. In interpreting contracts, the judge does not enjoy the large discretionary power that he possesses in other matters, for instance responsibility for wrongful acts. He is bound by the text of the contract, and, by a judgment of March 6, 1924, the Court of Cassation restated the rule once formulated by Vattel concerning the interpretation of international treaties: clauses which are clear and do not need to be interpreted must not be interpreted.

Though the point is controversial, French lawyers generally admit that the rules on *evidence* relate to the law of form rather than to substantive law. In spite of this, the Code Napoléon contains a series of principles on evidence, the introduction of which was justified on purely practical grounds by the close connection between substantive law and procedure. The passages which Mr. Dekkers has devoted to this question are most interesting, and it should be noted that, according to the author, there is no difference in nature between so-called presumptions of fact and presumptions of law (II, p. 419). Mr. Dekkers also explains the amendments introduced by practice in the system of the Code: rigid as they may seem, the rules on burden of proof are in effect notably softened by the obligation of the party who does not bear the burden of proof to co-operate in the collection of evidence (II, p. 365).

As respects *leases*, Mr. Dekkers notes the precarious character of the right of the tenant in the classical system, but also shows how much the laws on this subject have changed. His observations have international validity: recent legislative measures in many countries have given the tenant's right a stability not enjoyed in the past. Thus, the lessor cannot freely increase the rent, and his right of annulling the contract suffers important restrictions. This, for Mr. Dekkers, is a phenomenon of "socialization" of law (II, p. 563).

The evolution has been still more considerable in the case of *employment contracts* (*contrat de travail*). Indeed, the rules in the Civil Code constitute but very little of the law on this subject. This is explained by the facts that the Code Napoléon was made by landowners ("*Le Code civil est une oeuvre de propriétaires*," II, p. 638), and that labor did not acquire its present importance until the nineteenth century. It is worth noting that the remarks of the author on the "insufficiency of the Civil Code" could apply to the Swiss Federal Code of Obligations as well. Yet the Swiss Code is much more recent; it was not inspired by the landowner class, and furthermore it was made at a time when the importance of labor was fully recognized.

Matrimonial régimes constitute one of the most difficult chapters of civil law. Professor Dekkers describes its problems with remarkable simplicity. After explaining the reason for the so-called principle of "immutability," he suggests a less strict rule. The spouses should be allowed to change their régime during marriage, provided that appropriate measures of publicity are satisfied. This suggestion, inspired by the Germanic laws, is extremely interesting: yet if there are reasons against the principle of immutability, why not allow more than one change?

In discussing the system of separation of property, it is insisted that the primary duty of the husband is to maintain the family. The wife must simply "contribute" to the expenses of the household. This is the solution of positive law, and it is worth mentioning that there is a possibility that it may be changed simultaneously in France and Belgium. In France, the Commission for Revision of the Civil Code, in its published draft, proposes a rule according to which the household expenses would have to be borne by husband and wife in proportion to their respective resources. In Belgium, following a draft presented to the Senate by Madame Georgette Ciselet, the government has prepared a draft on similar lines.

These brief comments indicate merely a few examples, with no other purpose than to give an idea of the quality and usefulness of Professor Dekkers' book. It should be added that the large print makes this book very easy to read. Excellent indexes and tables make it easy to consult.

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ROSSI, G. *Il Fallimento nel Diritto Americano.* Padova: Cedam-Casa Editrice Dott. A. Milani, 1956. Pp. xxiv, 274.

Bankruptcy may be a macabre subject, but it holds out a brilliant lure to the comparativist. This is so because it is one of the none too numerous legal institutions that possess strong migratory propensities and have lent themselves to successful transplantations despite vast structural diversities in the recipient juristic milieus. The mediterranean communities and fairs of the Middle Ages were the birthplace of the novel legal mechanism for treating the insolvent debtor and his estate; thus any comparative study of bankruptcy, undertaken with an intelligent historical perspective, must of necessity reach back to these origins. American bankruptcy legislation, to be sure, took its early shape by recurrent borrowing from contemporaneous British patterns. Yet, this English law in turn owed much of its form and content to the great stream of continental ideas which in part flowed directly across the Channel and in part entered through the conduit of Scottish law. How much Scottish bankruptcy regulation depended on continental practices, even down to the compulsion of the bankrupt to expose himself to public shame and wear humiliating apparel, and how much it was responsible for certain advances in England, especially in the field of compositions, I hope to have demonstrated in an article which

appeared ten years ago.[1] This study of mine had the purpose of comparing American bankruptcy law with modern continental legislation in the field, particularly the recent Italian Act. Dr. Rossi now has surveyed the same area but from the opposite vantage point, intending to familiarize the continental, primarily the Italian, scholar with the current American bankruptcy law and thereby to fill a notable gap in the non-English legal literature.

Dr. Rossi's volume is the fruit of the author's one-year stay at the Harvard Law School where he enjoyed the benefits of Dr. Nadelmann's well-recognized expertise in the field. As might be expected from such guidance, the book, though comparatively slight in bulk, gives a comprehensive, intelligent, and instructive discussion of the various proceedings under the National Bankruptcy Act. The subject is divided into nine chapters. The first of these presents the historical development and general characteristics of American bankruptcy legislation. It is followed by four chapters devoted to straight bankruptcy. The sixth chapter deals with compositions and arrangements. The succeeding chapter focuses on the special features of liquidation and reorganization of corporations and partnerships. Thereafter agricultural compositions and wage earners' plans are taken up, and the final chapter contains a consideration of the conflict of laws aspects of the matter from the viewpoint of American law.

Actually, a reviewer cannot say much about a work such as this, which is, in the main, purely descriptive and compilatory. Certainly, the author has succeeded well in outlining the basic steps, features, and principles of the various procedures available under the American Bankruptcy Act. He has accompanied his presentation with a truly formidable barrage of references to law review articles and notes, some of which would appear to be quite dated to the American reader but which, nevertheless, might be valuable in acquainting the foreign scholar with the gradual sedimentation process of solving legal problems in the United States. The book is rich, perhaps even overstuffed, with parallels to, and contrasts with, English bankruptcy law, but otherwise, except in the first chapter, contains few comparative observations. As a whole the discussion is balanced and well organized. The only misgivings could arise in regard to Chapter IV where the rules pertaining to the circumscription, collection, and administration of the bankrupt estate and those regarding the discharge of the bankrupt are lumped together, although the section headings in the table of contents, which unfortunately are not reproduced in the text, show that Dr. Rossi was quite aware of the rather superficial connection between the two types of problems.

As to the substance, I was pleased to see that Dr. Rossi does not share the naïve belief in some American quarters that continental experience had shown that acts of bankruptcy could be totally dispensed with as a condition for

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[1] Riesenfeld, "The Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Act of Italy and the United States," 31 Minn. L. Rev. (1947) 401, especially p. 441, notes 308b, 310, 312.

involuntary proceedings,[2] a view criticized by me both in my above-mentioned article[3] and recently in my revision of the comments to Section 1(19) in Collier's Bankruptcy. Again, I am inclined to agree with the author's conclusions that the much decried statutory "balance sheet" test of insolvency has been transformed by the case law into a set of workable standards.[4]

Obviously, one is always apt to find omissions and inaccuracies, especially in a book on domestic law written by a foreign author. But without picayunishness it might be said that Dr. Rossi somehow has failed to put into proper relief the particular jurisdictional and substantive difficulties of American bankruptcy administration, stemming from the superimposition of a uniform and unified system of liquidation or rehabilitation upon at least 53 local laws possessing wide disparity as to security transactions and creditors' remedies.[5] His chapter on corporate reorganization seems to be lacking in sharpness of contours and depth, especially with regard to the different techniques in arriving at the new financial structure of the reorganized enterprise. In the historical discussion, one misses reference to the great role of insolvency proceedings in the United States as a palliative against imprisonment for debt; only the English aspect of the matter is mentioned briefly.[6] Also there seems to be doubt whether the author really has a clear grasp of the development and various forms of the individual collection remedies, in view of his curious oversight of the so important writ of elegit in one place[7] and his mention of attachment and garnishment, but not of execution, in another.[8] At any rate, the unduly large number of misspelled English words and other misprints form an annoying shortcoming of the book.

Despite the possible flaws, however, Dr. Rossi's book constitutes unquestionably a useful and authoritative picture of American bankruptcy law for the foreign student. It merits careful attention and high praise. The historical part is especially valuable and informative.

STEFAN A. RIESENFELD*

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[2] Rossi, Il Fallimento nel Diritto Americano (1956) 72.

[3] Riesenfeld, *op. cit. supra* note 1, at 414.

[4] Rossi, *op. cit. supra* note 2, 68, 69; *cf.* my comments in the 1957 revision of Collier, Bankruptcy, Sec. 1(19), 89–130.1.

[5] *Cf.* Mussman and Riesenfeld, "Jurisdiction in Bankruptcy," 13 Law and Cont. Problems, (1948) 29, an article unfortunately overlooked by Dr. Rossi.

[6] Rossi, *op. cit. supra* note 2, 20.

[7] Rossi, *op. cit.*, 10.

[8] Rossi, *op. cit.* 115.

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WESTERMANN, W. L.—SCHILLER, A. A. *Apokrimata: Decisions of Septimius Severus on Legal Matters*. New York: Columbia University Press 1954. Pp. x, 110.

This sumptuous volume, which is part of a series of Studies commemorating the Bicentenary of Columbia University, publishes for the first time the text of

a Greek papyrus fragment (P. Col. 123) acquired by the University in 1930. The fragment, which is reproduced in photogravure, has 60 lines of Greek, and consists of copies of thirteen decisions ("apokrimata") on legal matters of the Emperor Septimius Severus. These decisions were given in answer to petitions submitted to him by private persons during his visit to Egypt in the winter of 199–200 A.D. They were thus technically "subscripts"—i.e., the decisions were drafted by a section of the Emperor's staff, called the bureau *a libellis*, and were then written at the foot of the petition itself. After the Emperor had signed them, the petitions, with their replies, were exhibited in the Stoa in Alexandria, so that the petitioner or his representative could copy the reply.

The late Professor Westermann contributed a transcript of the text, an English translation, and an analysis of certain general historical questions raised by the fragment as a whole (e.g. the presence of a Stoa in the Gymnasium at Alexandria) and by the particular decisions. Professor Schiller's contribution includes another English translation, which sometimes differs materially from Westermann's, and a commentary on the legal points raised by the decisions. Both commentaries must now be read in conjunction with an article called "Second Thoughts on the Columbia Apokrimata" by Schiller and H. L. Youtie in *Chronique d'Egypte* (1955) pp. 327–345. This contains a second reading of the text made by Youtie after Westermann's death, which has established certain points which were formerly in doubt, and these improvements have required further comment from the legal angle, especially in the case of the Decisions numbered 6, 7, 8 and 12.

It is in its legal aspects that the main importance of this fragment lies, for it provides us with examples of the application of Roman and local law in Egypt at a particularly interesting period *i.e.*, immediately before the passing of the Constitutio Antoniniana, the edict which extended Roman citizenship to all the inhabitants of the Roman Empire. The erudition and balanced judgment with which Schiller has discussed the legal issues have been acclaimed by specialist Romanists in several reviews and articles. [See e.g., D. Daube, 71 *Law Quarterly Review*, p. 580; J. Gaudemet, *Revue Historique de Droit* (1955), p. 475; P. De Francisci, *IURA* (1955) p. 184; V. Arangio-Ruiz, *Gnomon* (1956), p. 186; H. J. Wolff, *Zeitschrift der Savigny Stiftung* (Rom. Abt., 1956) p. 406; F. Pringsheim, *EOS*, (1956, Symbolae Taubenschlag) p. 237.]

It must be admitted that the fragment raises more legal problems than it settles. The reason for this is that the text gives us merely the names of the petitioners and the answers to their petitions, and for a proper understanding of the problems raised we would need to have both questions and answers. Some of the latter are very cryptic, but, although they may add nothing to our knowledge of the law, they are interesting in that they illustrate the enormous range of problems with which the Emperor's staff was constantly faced, and the manner in which they coped with them—often, be it noted, by reference to an earlier decision.

Thus, for example, little information can be derived from No. 3, which con-

sists merely of the abrupt command to a number of petitioners, "Obey the findings made," or from No. 2, in which the Emperor tells a certain Artemidorus that his complaint against a court decision is too late, since he has accepted the findings.

On the other hand, some of the decisions are concerned with most complex problems of law. No. 8 is, as Schiller observes, (*Chronique cit.* p. 337), perhaps the most significant in its contribution to our knowledge of Roman procedure in the provinces. The subscript says that it is not right for heirs instituted in a will to be deprived of possession of the inherited property, and provides that "those entrusted with the supervision of cases shall take care to cite the accused persons if the matter is [enrolled] in the order of trials." The use of certain expressions, e.g., *gegrammenoi klēronomoi*, a literal translation of *heredes scripti*, shows that the case was dealt with according to Roman law as applied in the provinces rather than by local law. It seems that the petitioner is claiming the inheritance as the deceased's intestate successor from persons who are holding under a will. His claim is by the usual *hereditatis petitio* and is based on the allegation that the will under which the heirs have possession was forged. He seeks clarification of his position from the Emperor, who falls back on the general principle of Roman law that the successful prosecution of the criminal case was a prerequisite to the disposition of a civil case arising from the same matter. Thus the petitioner's *hereditatis petitio* will be suspended until the criminal *accusatio falsi* has been concluded. The latter proceeding was begun by asking the appropriate magistrate to inscribe the name of the accused in the register of criminal cases, which the petitioner is invited by the subscript to do.

No. 5 raises the question of the capacity of a woman (who is apparently not a Roman citizen) to engage in a particular legal transaction. The decision lays down that women are not forbidden to borrow money and pay it out on behalf of others. The interest in this subscript is that, according to local Greco-Egyptian law, it was undisputed that a woman had equal capacity with men in private law transactions, so that the petition seems to have referred to the position of women under Roman law and in particular to their disability under the Senatus consultum Velleianum, which was aimed at invalidating transactions in which women bound themselves on behalf of others. The jurists, however, held that the mere fact that a woman used borrowed money to make a gift to another did not invalidate the loan, and the Emperor repeats this view. Arangio-Ruiz (*op. cit.* p. 190) suggests that the rule laid down by the Senate was considered to be of a public character and so applicable even to provincial women who were not Roman citizens.

Other private law problems raised by the decisions concern a creditor's right to sell hypothecated property after he had taken possession by force (No. 4), and a guardian's rights over his ward's property (No. 13). In No. 12 the Emperor unusually sets out the facts of the case in his answer. The petitioner, a young man who has rejected his paternal estate, is told that he cannot now change his mind and object to the public auction of the estate, for he has out-

grown his minority status and lost the benefits arising from that status. (On this decision see Pringsheim, *op. cit.* p. 245.)

Many of the subscripts deal with details of criminal and administrative law and thus refute the impression which might be gained from a consideration of the rescripts quoted in Justinian's Code, namely, that imperial rescripts dealt mainly with questions of private law. Thus the first decision records that fines imposed on Egyptians were remitted by the Emperor within a specified time, presumably to celebrate his visit. What the petitioner, who was a Roman citizen, was seeking in this case is not known. No. 11 is particularly interesting. The Emperor delegates to Fulvius Plautianus, the Praetorian Prefect who accompanied him to Egypt, the investigation into the malpractices of one Comon, probably an Egyptian official, in connection with the collection of taxes farmed out by the state. He is also to hear the case against a tax farmer, Apion, if he was an accomplice of Comon; otherwise the prefect of the province, who was perhaps considered not sufficiently independent to withstand Comon's influence, would deal with Apion. The petitioner has presumably suffered from Comon's "audacities."

In No. 9 the petitioner had sought exemption from liturgical services on the ground of illness, a matter on which there may have been doubt. The Emperor in reply lays down a criterion for being excused from such service, viz., that if a person is able to undertake the care of his own affairs, he is still subject to liturgical services. In No. 10, on the other hand, some petitioners who had asked for permission to pay their taxes in money instead of in grain are merely reminded that this had already been prohibited, probably in some earlier imperial decision. (Westermann's remarks (pp. 32–34) about the devaluation of money at the time are of great interest on this point.) Reference to a series of decisions, as setting up a practice which ought to be followed in similar cases, seems to be made in No. 6, where it said that the special position of Egyptians is commonly taken account of in land-survey matters. So also in No. 7, which is concerned with the purely Egyptian practice of allowing priesthoods to descend by succession through the maternal side of the family, the Emperor patiently refers the petitioner to a previous decision prohibiting the practice.

On the language of the subscripts, Westermann holds that they were written originally in Greek, whereas Schiller maintains that the Emperor's Chancellery drafted them in Latin and then translated them into Greek. The latter view seems more likely as several expressions occur in the papyrus which are direct translations from the Latin but are unknown in current Greek usage. (See the list given by Pringsheim *op. cit.* p. 239.)

One of the most disputed problems concerning these rescripts is that of the purpose of the scribe in making the collection. Westermann and Schiller themselves offer different suggestions. Westermann thinks that the collection was made for the use of an up-country judge or lawyer to serve as a memorandum of possible precedents in future cases. This suggestion would be more likely if it were true (see *Chronique cit.* p. 345) that the text is a complete copy of *all* the

decisions given by the imperial bureau over a period of three days. Wolff (*loc. cit.*) has argued strongly in favor of this papyrus being a form of law report. What appears to the present reviewer to be an insuperable objection to this view is that without the original petitions to which they referred, the rescripts would in fact have been useless as precedents for future cases. Schiller prefers the view that the text is a memorandum made by a notary for his personal use and in particular as a repository of Greek translations of the technical expressions of Roman law. This ingenious suggestion is perfectly possible, but has not appealed to many reviewers. A suggestion of C. B. Welles (Am. J. of Philology (1956) p. 86) is that the text was produced by a professional scribe for sale to interested parties. The objection that no one would be interested in all the decisions is countered by the the point that such documents would be produced in bulk by dictation to a number of scribes in a scriptorium and that it might be cheaper to sell copies of a number of decisions thus produced than of one case only. This suggestion would be more plausible if the decisions were all given on a single day, whereas in fact they seem to have covered three days.

Gaudemet (*loc. cit.*) favors the idea that the copies were made for a group of petitioners living in the Fayum where the papyrus was probably discovered. Schiller had rejected this view on the ground that it is unlikely that such a number of petitions would stem from the same locality and all be answered at the same time. But this suggestion would at least explain one point—namely that the scribe, although he omitted any reference to the petitions themselves and did not bother to mention the name of the Emperor, which was added by a second hand, was careful to insert the names of the addressees of each decision. As we know from other sources, the inscription at the head of any subscript always gave the name of the Emperor. If the memorandum was merely for personal use of a notary, it is surprising that he omitted the first part of the inscription but kept the second. The petitions from the same region may well have been disposed of together and perhaps, as Arangio-Ruiz suggests (*loc. cit.*) the papyrus was prepared for a local official in the Fayum.

P. Col. 123 gives a fine insight into the actual working of law and government in Greco-Roman Egypt in the heyday of classical Roman law, and its editors deserve our thanks for their stimulating guides.

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Book Notices

HANS VON HENTIG, *Die Strafe*. Vol. II. *Die Modernen Erscheinungsformen*. Berlin, Göttingen, Heidelberg: Springer Verlag, 1955, Pp. viii, 414.

The first volume of this work dealing with the early forms of punishment appeared in 1954, and was reviewed in the spring issue of this *Journal* (*supra* p. 304). Volume I takes us up to modern times, and although the author's approach is mostly historical, at times he uncovers the residual layers in the psychology of contemporary society in order to trace the origins of a form of punishment. In a sense, therefore, the study of the early forms is not confined strictly to an historical period, and must be read as an introduction to Volume II.

The key to Volume II is to be found in the short preface (*Vorwort*) which defines the field of inquiry, its methods and goals. The study deals with principal forms of punishment (*Hauptstrafen*): the death penalty, various forms of confinement, flogging, various forms of deportation, and fines. Additional punishments (*Nebenstrafen*) and all modern aspects of criminology are omitted. Preventive measures (preventive confinement, mandatory hospitalization, confinement in mental institutions, prohibition of residence, practice of a profession, and duty to report to police) suspended sentence and conditional parole, and penalties affecting one's honor have no place in this volume.

The purpose of the study is to trace the psychological and sociological background of various forms of punishment. There is little profit, so the author believes, in encumbering his book with descriptions of various forms of punishment according to the laws in force, because, as he himself states, "the law provides only the surface, under which life moves forward in its strange distorted forms."

It is the sovereign right of the author to define the field of his inquiry; however, the reviewer is forced to dispute certain of the reasons given by Professor Hentig for his delimitations. Thus, for instance, the author states somewhat arbitrarily that preventive confinement, so widely resorted to under Hitler's regime in Germany, afterwards fell into disuse and lost its importance, or, as the author puts it, demonstrated no great vitality. Obviously, this conclusion is the result of a confusion of ideas, quite similar to those which we noted in reviewing Volume I. Hitler's concentration camps were not preventive confinement as modern criminology understands it, nor did their purpose have anything in common with prevention in modern criminal law. They were a purely political measure, and while preventive confinement is one of the consequences of a criminal act, Hitler's concentration camps were full of innocents. Preventive measures have always been calculated to apply to a numerically small core of recidivists, professional or habitual criminals, and it has always been contended that these constituted a special category requiring additional and specific measures to isolate them from the community. Obviously, the effectiveness (*Vitalität*) of preventive measures is not in the large numbers of those confined.

The reviewer cannot avoid the impression that the real motive for the restrictions imposed by the author on the field of his inquiry was that otherwise the character of the book would be fundamentally changed, and the main thesis of the author considerably weakened. And this thesis is that punishment as a tool of social protection is a failure. Quoting Plutarch, the author says the stroke of the sword will not extinguish the fire. To introduce the

review of modern developments in the field of criminology would blur the picture, which the author, in order to advance his thesis, had to draw in contrasting colors. But the picture thus drawn is not a true picture. Various forms of punishment as described in the book in their sociological and psychological concatenations come to the reader in their crude forms, without those refinements with which modern criminology has equipped them. Consequently, Professor Hentig's study sometimes has the quality of a propaganda pamphlet, and is not always characterized by academic objectivity, and with all its limitations regarding subject matter, the second volume hardly contains the fare promised by the title.

The second volume begins with an important introductory chapter on the psychological mechanism of punishment, which sets the framework for the subsequent consideration of individual penalties. The social milieu in which human relations resulting from punishment take shape and evolve, influences more persons than those directly affected. In addition to convicts, a wide range of human types comes into the picture. In the first place belong those immediately concerned: the wardens, prison directors, prison functionaries, doctors, and all others connected with the execution of sentences or the control of the life of prisoners. Then come the judges. On the outer rim of the social group thus created are the legislators. The severity of laws, in the final analysis, is the prime cause of criminality. As the author says, severe laws mobilize the raw souls existing in the bosom of society, and criminals appear in great numbers. In its turn, society reacts by creating executioners, prisonmasters, and inquisitors.

The chapter on the psychological mechanism of punishment is followed by three books, the first treating of the death penalty, with a special chapter devoted to the great controversy on the death penalty, the second on confinement, and the third dealing with all other forms of punishment.

The general tone of the book is pessimistic. The author notes the failure of all measures of punishment as means of social control. The general picture produced by Professor Hentig is one of great confusion. Nothing is certain. Policies of crime repression are full of contradictions and hesitations. Passions reign supreme. As the author puts it: "There exist firm medical rules regarding the treatment of broken bones or an inflamed eye. When it comes, however, to crime therapy, we change our opinions every three or four years. It appears that in technical matters we can distinguish without difficulty between good and better, and that we follow the advice of experts. In great matters of social control we recognize no firm ground, no strong leadership, no positive rules. All is myth, changing desire, spiritual expression of the over-stimulated or retarded glands." (Vol. II, p. 102)

It is difficult to dismiss in this manner the general progress which modern criminal law and criminology have achieved. One may be dissatisfied with the rate of progress, but Professor Hentig's complaints about some shortcomings in the field of criminology are valid not only as regards this aspect of the social sciences. In spite of all the aggressive claims which modern sociology is making about its achievements in understanding the forces active within a social group, we are about as far from solving the basic problems of social life as ever. However critical one may be of the present state of criminal law and criminology, 150 years of constant efforts of scholars and humanitarians since the time of Beccaria have radically changed the treatment of convicts, and produced a fundamental reform of criminal law, including punishment. The progress thus far achieved has not been a wholly haphazard affair, and from the vantage point of our times one can easily discern the guiding principles. They are

the ideas of liberty and human dignity, and the progress of criminal law is directly related to the progress of ideas of political freedom. As long as the demand for reform takes its initiative in the advancement of the ideas of political freedom, the movement forward is assured.

It is striking how often various forms of totalitarianism have exploited pseudo-scientific theories calling for the reform of criminal law. Such concepts as *l'uomo delinquente*, racial superiority, and class distinction have invariably served as the basis for discrimination in the administration of justice.

The reviewer must express his reservations about some of the methodological aspects of Professor Hentig's study. In particular, the usefulness of a concept of separate social groups bound by the phenomenon of crime is highly questionable. In fact, if one considers the vast ramifications of this group as it finally emerges from under the author's pen, one comes to realize that it is nothing less than society itself.

Despite all this criticism, Professor Hentig's study is a powerful book. Its conclusions are, in view of the restriction of the field of inquiry, sometimes too dramatic and peremptory. One may quarrel with them, but one must be moved by the author's sincerity and his feeling for the subject.

KAZIMIERZ GRZYBOWSKI*

MOLINA PASQUEL, R. *Contempt of Court. Correcciones disciplinarias y medios de apremio.* México: Fondo de Cultura Económica, 1954. Pp. 430.

The theoretically unlimited power of the common law judge to punish summarily for contempt those whom he considers to have offended the dignity of his court or to have lessened its authority has always appeared strange to civil lawyers. The civil law of necessity has developed its own technique of handling some of the situations which we would consider as constituting contempt of court, but no over-all concept of such an inherent power of the judge has ever developed. The absence in the civil law of an institution equivalent to our contempt of court is poignantly illustrated by the fact that the author of the book which is being reviewed was forced to use an English title for his Spanish-written work.

The book is valuable as a genuine study in comparative law. It presents side by side the common law rules of contempt of court and the analogous, though not always similar, institutions of the civil law, and evaluates their effectiveness. The portion devoted to American law (English law is dealt with rather summarily) will be of little interest to the American lawyer as it is mostly a condensed translation of the pertinent standard works. But it is valuable as a demonstration of the difficulties the writer on comparative law encounters. The most obvious obstacle is the lack of up-to-date source material on foreign law. The author had to rely heavily on the 1917 edition of Corpus Juris and on the book on contempt by Edward M. Dangel (National Lawyers' Manual Co., Boston, 1939). Many passages in the book prove that, even when such source material is available, it appears strange and unfamiliar to the civil lawyer, accustomed to a different style and form of presenting the law.

A more fundamental difficulty is presented by the circumstance that the author is not able to take for granted any knowledge on the part of his readers. Though the book deals essentially with a specialized subject, elemental concepts like equity, injunction, the judicial role of the chancellor have to be explained at length. This is further complicated by differences in legal terminology in English and Spanish and the lack of adequate translations for some terms. (Even the author occasionally fails to avoid the pitfalls of translation: a familiar rule of equity is rendered as "no man shall take advantage of his own mistake"—a confusion obviously caused by the double

meaning of the word "wrong".) That in spite of all these handicaps the author achieved a clear and systematic presentation of the principal rules governing contempt of court must be considered a praiseworthy accomplishment.

Similarly, the portion of the book devoted to civil law procedure presents a competent summary of a not always simple subject. The devices used by the civil law to achieve the aims served by contempt of court proceedings are twofold: disciplinary proceedings (*correcciones disciplinarias—délits d'audience*) and judicial compulsion (*medidas de apremio—contrainte*). But, as the author points out, their nature and use differ in the various countries. Disciplinary proceedings for offenses against the dignity of the court are by far the older institutions of the two (they appear already in the Code of Justinian and most of the medieval Spanish codes). Though summary in many jurisdictions, they are usually considered as partaking of the nature of criminal prosecutions. Only in relatively recent times have some countries introduced noncriminal punishment for offenses against the courts. The classes of persons subject to disciplinary proceedings vary: they may be limited to officers of the court and litigants; some countries extend their use to witnesses, lawyers, and other participants in litigation. In all cases, the proceedings must be provided for by statute, and the punishment is limited by law. In all other instances (constructive contempt and contempt committed by persons not subject to the disciplinary power of the court), the authority of the court can be vindicated only by regular criminal proceedings for the commission of specified offenses.

The possibility of enforcing the orders of the court otherwise than by execution of the judgment or an action for damages is practically unknown to the modern civil law. The power of the judge over the person in noncriminal proceedings (the *apremio* of the Spanish law and the *contrainte par corps* in France) has been linked in the mind of the civil lawyer with the institution of torture and disappeared with it. The only vestige of *apremio* in Spain and some Latin-American countries is the seldom used power of the judge to have recalcitrant witnesses—but not litigants—brought to court by force, as well as a rather antiquated action *in personam* for the return of original documents and written pleadings which a litigant may have borrowed from the court files for the preparation of his case. In consequence of this limitation of the court's powers, the obligation *de non faciendo*, as the author points out, is practically unenforceable under the civil law unless damages can be proved and recovered.

Some countries, however, have extended the idea of *apremio*. In Mexico, for instance, the judge may impose fines and prison sentences if necessary for the enforcement of his decrees; in labor law proceedings, the parties may be forced to appear in court. However, it should be pointed out that, according to a poll conducted by the author of the book, fines are only rarely and prison sentences practically never employed in Mexico for the purpose of *apremio*. Similarly, in Germany fines and prison sentences may be imposed to enforce orders of the court that cannot be executed by persons other than the one against whom they are directed and when damages would be insufficient. Finally, the Anglo-Saxon institution of contempt of court has exerted some influence on the civil law, and its adoption in Uruguay was proposed by Professor Eduardo J. Couture in his draft proposal of a Civil Procedure Act.

The author of the book would not go as far as that. In general, he considers the institutions and methods of the civil law superior to those of the common law. But he does believe, and the fact that he took the trouble of writing the present book is conclusive proof of this, that a better knowledge of foreign

legal concepts is essential for lawyers. Mr. Molina Pasquel certainly has contributed his share to the extension of that knowledge.

MICHAEL A. SCHWIND

HAUFFE, H. G. *Der Künstler und sein Recht*. München: Verlag C. H. Beck, 1956. Pp. xii, 344.

The subtitle, *One hundred entertaining chapters, and not only for authors and lawyers, with samples of contracts and of income-tax returns* (as your reviewer translates) characterizes the volume quite adequately. There are four parts of approximately equal length: I. *Das Werk* (The Work itself); II. *Schutz* (Protection); III. *Verbreitung* (Distribution); IV. *Urheber* (Author), which includes ten pages of sample contracts and about 16 pages of advice by Reinhold Kreile, a tax expert.

The author is a well-known German attorney and bibliophile; his purpose was to provide the layman with a legible, understandable textbook on German copyright, which may be read with profit by the lawyer. It deals with every possible type of protection for every possible type of work, whether entitled to protection or not. The author is at his best when he explains borderline cases.

The American reader will be especially interested in the chapter *Copyright* (p. 148 ff.) in which the author points out that the mere fact of a United States copyright enhances the dignity and value of any printed work in Germany. Hauffe contradicts the statement of a German copyright specialist, Walter Bappert, that according to American usage copyright is granted to the publisher, not the author. The most famous case, counterproof to Bappert's theory, seems to be the late Thomas Mann's whose illustrious name appears in the copyright of his last novel *"Felix Krull."*

On page 149, Hauffe indulges in a provincial remark—below his own level—that "Copyright by" is a piece of American formalism with which "we" (apparently the Germans of the Federal Republic) hardly would have become acquainted without the—American—occupation. This remark is characteristic of the most recent German attitude, nagging, if only humorously, but at any price, at the former conquerors. Actually, ever since German literature attained international importance, German authors and publishers have sought the protection granted by copyright in the United States for their publications. Long before World War I, the editions of works by Gerhart Hauptmann, A. Schnitzler, etc., had been registered for the American copyright as soon as they appeared in the bookstores. Incidentally, the period of United States copyright is not quite correctly stated; it is granted only for 28 years—not 56, as per Hauffe—but may be extended for 28 more years.

Of the greatest interest to the American reader will be Hauffe's chapter (p. 152) on the protection of musical compositions. In its modern form, this was suggested by no one less than Richard Strauss through the organization of GEMA, the powerful German association of composers united with the Institute for the supervision of the right to perform (Anstalt für musikalisches Aufführungsrecht). In Germany at least, there is a painful limitation on those rights; the courts repeatedly have absolved organizers of *Volksfeste* (popular festivals) from paying royalties. The *Vereine* also profit by similar decisions, which usually uphold the rights of the people to enjoy music and sidestep the claims of authors who contribute to such enjoyment; this peculiar interpretation not only favors cultural or musical *Vereine* in the narrower sense, but even includes automobile clubs with members who could well afford to pay royalties.

The success of this book in Germany is quite understandable; it is an exhaustive "reader" in the usual dry field of copyright, quite amusing and entertaining, for Germans as well as non-

Germans. A register of names of authors and works reads like the alphabetic index of the history of western arts.

ROBERT RIE

ANTHONY, J. G., *Hawaii Under Army Rule.* Stanford, California: Stanford University Press, 1955. Pp. x, 203.

Hawaii Under Army Rule verifies the statement by De Tocqueville in *Democracy in America:* "I have often asked myself what would happen if, amid the laxity of democratic customs, and as a consequence of the restless spirit of the Army, a military government were ever to be established among any of the nations of our times . . . the result would be a regular, clear, exact, and absolute system of government; the people would become the reflection of the Army, and the community be regimented like a garrison." Mr. Anthony has carefully documented and prepared this intimate picture of Hawaii under Army rule, having served as Attorney General of Hawaii from October, 1942 to December, 1943.

It was only a few hours after the attack on Pearl Harbor that Governor Joseph B. Poindexter of Hawaii issued a precipitous proclamation placing the territory under martial law. This was the first time in American history that a military government replaced civil courts on loyal American territory.

The right of the writ of habeas corpus was suspended, and the commanding general of Hawaii was authorized to exercise all the powers of the governor. Army rule continued after the emergency for which it was proclaimed no longer existed. Thousands of persons were convicted in provost courts, some with trials, some without. Persons were held without bail and were obliged to purchase war bonds or donate blood in lieu of prison sentences. Martial law was allowed to be administered for years without correction from Washington; the situation went uncorrected, because, once a decision was reached by a military commander, change was resisted even in the face of almost conclusive evidence of gross error. Ironically, those that compounded, perpetrated, and perpetuated the original error and flourished under it were promoted to higher office after the war.

The author concludes in part with the statement attributed to Abraham Lincoln: "You will find all the arguments in favor of kingcraft were of this class; they always bestrode the necks of the people—that they didn't want to do it, but that the people were better off for being ridden." *Hawaii Under Army Rule* is an object lesson to all those that have any part in the administration of law that it could happen, and did happen, in our time, under our government, to our people.

The book has been drawn with extensive revision by the author from a series of earlier law review articles.

LEONARD L. LOEB

GOLDSCHMIDT, R. (Ed.) *Las ventas con reserva de dominio en la legislación venezolana y en el derecho comparado.* Caracas: Publicaciones del Ministerio de Justicia, 1956. Pp. 171.

This Journal (vol. 5, Winter 1956, pp. 119, 120) noted the enactment in Venezuela of a law expressly authorizing conditional sales. The volume under review contains the text of the statute and the official reports that accompanied its presentation, preceded by an analysis of the statute by Dr. Goldschmidt in the light of comparative law and conditions in Venezuela. A second part is a more detailed historical and comparative study of conditional sales by Dr. Zambrano Velasco. A third part contains the text of the pertinent statutes of Peru, Chile, Mexico, Honduras, Dominican Republic, and Panama, and (in translation) of Germany, Switzerland, Italy, Brazil, and the United States (Uniform Law), the latter with an introduction by Dr. Cordido Freytes. This credit-

able work, of practical value, was prepared by the Section of Comparative Law of the Central University.

PHANOR J. EDER

OSBORN, P. G. *A Concise Law Dictionary*. 4th ed. London: Sweet & Maxwell, Ltd., 1954. Pp. vii, 899.

A little earlier than usual, a new edition of this now indispensable dictionary takes its place on our shelves (1st edition, 1927; 2nd edition, 1937; 3rd edition, 1947). Faithful to his policy of modernization, the author tells us in the preface about the suppression of some references to obsolete institutions, in order to have more room for the inclusion of the increasing mass of new material; the idea being to give us, in a short volume, an accurate statement of the positive law of England.

Nevertheless, he deserves thanks for having preserved, in this new edition, an historical apparatus without which a good understanding of modern law is difficult. Consequently, his dictionary, despite his assertions, provides a most valuable memento of both past and present law. Needless to say that the fourth edition exhibits all the qualities which commended the previous ones, above all, brevity and limpidity. Many references to leading cases save tiresome researches. This dictionary is, indeed, concise. It should be added: concise and precise.

J.-F. AUBERT

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Classified Advertisements

Bulletin

REPORTS

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW—The annual meeting of the Committee as the Executive Bureau of the International Association of Legal Science, was held at Barcelona, Spain, 17–20 September, 1956, in conjunction with the First Comparative Law Congress under the auspices of the Association. Messrs. C. J. Hamson, Naïl Kubali, F. de Solá Cañizares, K. Zweigert, and Hessel E. Yntema, members of the Committee, were present, and in addition Messrs. René David and Åke Malmström, representing President Julliot de la Morandière and Mr. Emil Sandström, respectively, Mr. G. de Lacharrière, Directeur-Adjoint du Département des Sciences Sociales of UNESCO as observer, Mr. Kurt Lipstein, Director of Research, and Mr. A. Bertrand, Secretary General of the Association. Professor René David presided, acting for Sr. de Solá Cañizares, elected chairman in the absence of the President. The open session on September 18, 1956, was attended by 19 additional representatives of as many countries and international organizations.

The principal decisions of the Committee included: election of Mr. Emil Sandström as president of the Association to succeed Dean de la Morandière, resigned; admission of the national committees of Bulgaria, Poland, and Russia to Association membership; recommendation of changes in the *statuts* to enlarge the Committee to nine members; adoption of plans for preparation of national bibliographies and various other comparative law publications; and establishment of a program of future conferences, on legal aspects of pacific co-operation, reception of Western law in Turkey, Western and socialist conceptions of legality, and stability of the family. Of particular interest to jurists in the United States is the acceptance by the Committee of the invitation extended by the American Foreign Law Association, as the United States national committee, to hold the annual meeting in 1957 in Chicago. The arrangements for this meeting, made possible by the generosity of the Ford Foundation and the University of Chicago, contemplate two *colloquia* at Chicago in addition to the sessions of the Committee, between September 9 and 19, 1957, one on Western concepts of legality (Hamson, reporter) and the other on stability of the family (Rheinstein, reporter).

H.E.Y.

BARCELONA COMPARATIVE LAW CONGRESS—The First International Congress of Comparative Law of the International Association of Legal Science "under the aegis of Unesco" was held in Barcelona, Spain, September 10–17, 1956. Some 200 jurists from 37 countries attended (14 being registered from the United States). In addition to the sessions of the International Committee of Comparative Law, above-noted, there were four *colloquia:* Reception of Foreign Law in India (Patanjali Sastri of the Supreme Court of India, president; general report by K. H. Lipstein of Great Britain); The Right of Succession of a Surviving Spouse (Arturo Alessandri of Chile, president; general report by Alfonso de Cossio of Spain); The Principle "*Audi alteram partem*" in Comparative Administrative Law (Luis Jordana de Pozas of Spain, president; general report by F. H. Lawson of Great Britain); The Legal Means, direct or indirect, to Promote the Stability of the Family (Paul Orlowsky of USSR, president; general report by Max Rheinstein of the United States). The sessions of experts invited to discuss the first three topics took place simultaneously at Barcelona, September 10-

12, while those in the colloquium on stability of the family occurred at Santiago de Compostela, September 5–7; in addition, there were plenary sessions on each of these topics. Two general sessions were devoted to Problems of Teaching Law on the basis of general reports by Konrad Zweigert (Germany) and Charles Eisenmann (France). Conclusions were adopted and a variety of special reports were submitted on each topic. A special Commission on the Co-ordination of Comparative Law Centers (H. E. Yntema, president) recommended new revised editions in English and French of the "Catálogo" of Comparative Law Centers, prepared in Spanish by the Institute of Comparative Law of Barcelona, as well as the continuation, with certain changes, of the Bulletin of Information also experimentally published by the Institute; a second Commission on the Reciprocal Influence of the Common Law and the Continental Law (F. de Solá Cañizares, president) approved an inquiry on this topic, to be undertaken by the Barcelona Institute of Comparative Law under the supervision of the International Committee of Comparative Law, with the assistance of an advisory committee. The sessions were held in the new quarters of the Institute, by which the proceedings were organized under the skilful direction of Sr. de Solá Cañizares. There were a number of receptions, excursions, and other events that brilliantly enlivened the proceedings, at which the members of the Congress enjoyed the gracious hospitality of Spain in the fascinating environment of Catalonia.

H.E.Y.

COLLOQUIUM ON METHODS OF UNIFICATION OF LAW—Under the auspices of the International Institute for the Unification of Law, located in Rome, a conference of organizations concerned with Unification of Law was held in Barcelona, Spain, from September 17 to 20, 1956, for discussion of methods of unification. The National Conference of Commissioners on Uniform State Laws had been invited and was represented by the writer of this note.

The majority of those represented at Barcelona came from groups having governmental status. Thus, five of the agencies set up under the Charter of the United Nations were represented, the International Law Commission, UNESCO, FAO, the International Civil Aviation Organization, and the International Labor Office. Some six or seven other organizations represented at Barcelona were both governmental and international in that they were created by bilateral or multilateral conventions to deal with legal problems having international aspects even though most of them were regional in character. This is especially true of the Council of Europe, the Nordic Council, the League of Arab States, and Benelux. In addition to the above, other international organizations represented were the International Union for the Protection of Copyrights and Patents and the International Transportation Office. Nongovernmental organizations represented at Barcelona included the International Maritime Committee, the International Chamber of Commerce, the International Bar Association, the International Law Association, and the National Conference of Commissioners on Uniform State Laws. Not represented was the Conference of Commissioners on Uniformity of Legislation in Canada.

The Barcelona Conference lasted three days. The first day was spent discussing the general aspects of uniformity. The most concrete result of the first day's discussion may be summarized by saying that those present were somewhat surprised to discover that so many organizations and individuals were concerned with promoting uniformity in the law, each in his or its separate way. Even though some of the organizations limited their activities to one subject matter, the problems encountered were quite similar. The second day's discussion dealt with the mechanics employed by the different organizations in preparation of drafts, and the final day's discussion dealt with the questions of how to obtain the maximum result. The following resolution was adopted:

"It has become apparent from the work of the Meeting of the Organizations concerned with the Unification of Law that, while methods of unification may vary from one case to another, some problems are common to the various cases of unification of law, although obviously they do not always have the same importance. Therefore, it has appeared that it would be useful for representatives of the Organizations which, either as their principal concern or as a means of attaining their own objectives, contribute to the unification of law under any form whatsoever (by legislative unification or legislative harmonization, by the preparation of model codes, by the setting up of common minimum norms, by recommendations, by the normalization of commercial practices or others), to meet from time to time in order to derive mutual benefit from their experience, to convey their programs of action in the matter, to set forth the problems of methodology which they may have met, and to study more closely certain questions of common interest."

The Secretary General of the Rome Institute, Dr. Mario Matteucci, had prepared a general report on "The Methods of the Unification of Law." Several of the institutions invited submitted reports or memoranda concerning the methods they have followed. These materials and the minutes of the discussions will be published in the Year Book of the International Institute for the Unification of Private Law.

JOE C. BARRETT

DUBROVNIK CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION—The Forty-Seventh Conference of the International Law Association met at Dubrovnik, in Yugoslavia, August 26 to September 2, 1956. To Americans, the point which is perhaps of most interest in this conference was the decision to accept the invitation extended by the American Branch and to meet at the New York University Law Center in 1958. The Association last met in this country in 1930.

Dubrovnik, on the sunny coast of the Adriatic, was a delightful location, and the Yugoslav hosts entertained their guests in bountiful fashion. Milan Bartos, head of the Yugoslav Branch, was elected President of the Association and began the discussions with a talk upon the Juridical Aspects of Active Peaceful Coexistence between States. The following day was devoted to Review of the United Nations Charter, and a resolution was adopted on that subject.

The report of the committee on the Uses of the Waters of International Rivers (the chairman being the writer of this note) aroused warm debate. Members from India and Israel moved adjournment of consideration of the subject, but later withdrew their opposition, and, at a second session, a resolution was unanimously adopted.

The Committee on Insolvency was asked to continue its work, and the British committee was asked to reconsider its draft to meet objections raised. The International Company Law Committee was asked to study the question of the transfer of the place of central control and to draft a convention concerning all questions considered at Dubrovnik. The Committee on Family Relations, subjected to unexpected attack, was asked to consider further the draft Convention which had been criticized at Dubrovnik. The Conference approved the draft Convention on Payment of Foreign Money Liabilities prepared by the committee on Monetary Law (Prof. Gutzwiller, chairman, F. A. Mann, reporter). Also approved was the report of the Air Law Committee (of which Arnold Knauth was made chairman) which, among other things, recommended that states which have not signed the International Air Services Transit Agreement should do so. A resolution was adopted on the initiative of the Yugoslav Branch, asking for study of international medical law, especially in connection with the Geneva Conventions.

Sixty-seven Americans were listed as registered to attend the Conference, though not all of them appeared; some were called away to participate in important international legal controversies.

The host country had invited representatives from various communist countries, and they were permitted to attend as guests and to speak when invited by the chairman. Among the persons from the Soviet Union was Judge Krylov, who spoke on formal occasions. Few of these guests spoke except in opposition to review of the Charter of the United Nations. Poland was readmitted as a branch; it seems probable that other Communist States will have organized branches by the time of the next Conference.

The New York University Law Center had offered facilities for meetings, lodgings for a hundred foreign guests, and a guarantee of the expenses of the working conference up to a certain amount. This offer was well received, in spite of uncertainties expressed concerning the cost of the trip, and at the suggestion of Mr. Bartos, the invitation was accepted by acclamation in the Full Council. It is hoped that American international lawyers will keep in mind this rare visit of the International Law Association to this country and will reserve a week around the first of September, 1958, to attend its sessions.

CLYDE EAGLETON

OSLO CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION—The Sixth Conference of the International Bar Association was held in Oslo, Norway, July 23–27, 1956, at the invitation of Den Norske Sakførerforening (the Norwegian Bar Association). Member Associations comprising the national bar associations of a large part of the world sent delegations. Forty countries were represented by 464 members of the legal profession, accompanied by 251 guests. The opening session was held at the University of Oslo and was attended by His Royal Highness Crown Prince Olav.

Thirty-five member organizations appointed official delegates to the General Meeting, which approved a proposed International Code of Ethics for the Legal Profession, discussed at several previous conferences. Formulated as a statement of principles for the guidance of lawyers handling cases of international character, the Code is "in no way intended to supersede existing national or local rules of legal ethics or those which may from time to time be adopted." The delegations from Canada, the Philippines, Sweden, Switzerland, and the United States abstained from voting on the Code.

The following topics were discussed in plenary sessions and symposia: International Ship-Building Contracts—Particularly Legal Problems in Connection with Finance and Security; The Legal Profession—The Work of the Organized Bar in Furthering the Legal Profession and its Public Services; Administration of Foreign Estates—Problems of Executors and Possible Solutions; Suggestions for Alleviating Hardships Arising from Sovereign Immunity in Tort and Contract; Suggestions for Improvement of International Treaties to Avoid Double Taxation; Foreign Divorces—Problems arising and Possible Solutions.

In addition, meetings of committees were held to consider: Human Rights; International Economic Co-operation; Immigration and Naturalization; Ways of Improving Legal Aid for Foreign Nationals, resident or nonresident; International Judicial Co-operation; Proposals for an International Code regulating H ndling of Property of Enemy Nationals and Residents in Enemy-Occupied Territory.

In all, more than fifty papers on conference topics were presented. Rapporteurs had prepared outlines of the topics and authors based their papers on these outlines. The major portion of conference papers had been mailed in advance to registered conferees. The quality of the papers submitted and the interesting discussions which resulted demonstrated the value of advance preparation. The Report of the Oslo Conference will contain, if possible, the large majority, if not all, of the official papers presented.

The General Meeting elected Loyd Wright of Los Angeles, former President of the American Bar Association, Chair-

man; and Gerald J. McMahon of New York, Secretary General of the Association—succeeding in that office the Hon. Amos J. Peaslee, former United States Ambassador to Australia and now serving in a government post in Washington, D. C. Thomas G. Lund of London, Secretary of The Law Society of England, was elected Treasurer. Paul B. DeWitt, Executive Secretary of the Association of the Bar of the City of New York, was appointed Assistant Treasurer.

An interesting program of social events was enjoyed by the conferees, including receptions by the Mayor of Oslo and by the Minister of Justice.

GERALD J. MCMAHON

A.I.P.P.I. MEETING IN WASHINGTON, D. C.—During the last week in May, 1956, the Biennial Congress of the *Association Internationale pour la Protection de la Propriété Industrielle* (A.I.P.P.I.) was held in Washington, D. C., upon an invitation extended by the American Branch of this group, which is now operating as the "International Patent and Trademark Association." The Washington Congress was an outstanding event, not only because it was the first convention of this international organization in the United States, but primarily because it was likewise the first meeting of this kind which was almost global in scope and attendance, since many sister American republics sent delegates, including even those countries which are not at present parties to the International Convention of 1883.

When the Inter-American Bar Association met at Dallas, Texas, in April, 1956, it was already apparent that there was growing interest in many of the other American republics in working toward adherence to the Paris Convention, as last revised in London in 1934. A formal resolution was adopted, requesting the Director of the International Bureau at Berne to extend a formal invitation to the governments of all American republics to adhere to the Convention, or, in any event, to send delegates or observers to the Diplomatic Conference for revision of the Convention which will be held in Lisbon in 1957. At the A.I.P.P.I. Congress at Washington, D. C., our delegation inspired the adoption of a unanimous resolution in almost the same words in which it had been formulated at Dallas, and the exceptionally large attendance of delegates and observers from the other American republics justifies a note of optimism toward ultimate adoption of a truly universal convention dealing with patent and trademark protection, which might eventually combine the better features of both the Paris Convention and the General Inter-American Trademark Convention of Washington, 1929.

Perhaps even more encouraging and significant with regard to the improvement of our international trademark relations is a resolution passed by the Washington Congress recommending that both French and English should be recognized as official Convention languages and that it should be recommended to the forthcoming Diplomatic Conference in Lisbon that the International Bureau in Berne be provided with the necessary funds to publish its authoritative *La Propriété Industrielle* in English as well as in French. At the same time, the Director of the Berne Bureau announced in Washington a plan for publication by the Bureau of a periodical to be printed in English and made available on a subscription basis, which would contain articles and reports of developments of interest to the patent and trademark Bars in all English-speaking countries. Even though it may be true that comparatively little progress was made during the recent meeting toward establishing uniform substantive Convention law with regard to trademarks, and that, indeed, the problem of finding an internationally acceptable definition of a trademark was referred back to the Executive Committee for further study, both government representatives and individual delegates were able to leave the meeting with a sense of genuine satisfaction and encouragement.

A complete report of the resolution adopted and the various papers delivered may be found in the Special Convention

Issue of The Trademark Reporter, Vol. 46, No. 6, June, 1956.

WALTER J. DERENBERG

EIGHTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW—The Eighth Session of the Conference of The Hague on Private International Law was held from October 3 to 24, 1956. It was attended by delegates of Austria, Belgium, Denmark, Finland, France, Germany (Federal Republic), Great Britain, Greece, Italy, Japan, Luxemburg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and Turkey; an observer from Yugoslavia and a United States Observer Delegation, composed of Messrs. Philip W. Amram, Washington, D. C., Joe C. Barrett, Jonesboro, Ark., Kurt H. Nadelmann, Cambridge, Mass., and Willis L. M. Reese, New York, N. Y.

The Conference agreed upon four draft conventions, namely, (1) on the Law applicable to Transfer of Title in International Sales of Goods; (2) on the Jurisdiction of a Contractual Forum in International Sales of Goods; (3) on the Law Applicable to Obligations to Support Minor Children; (4) on Recognition and Enforcement of Decisions involving Obligations to Support Minor Children. One of the drafts, the Convention on the Law Applicable to Obligations to Support Minor Children, was signed immediately by representatives of seven nations: Austria, France, Greece, the Netherlands, Norway, and Spain. The official French text, to appear in the "Actes de la Huitième Session de la Conférence de La Haye de Droit International Privé," is reproduced in 45 Revue Critique de Droit International Privé (1956) 746. A translation may be found at page 650 of this issue. The members of the United States Observer Delegation had suggested presentation of the drafts both in form of draft conventions and draft uniform laws. No action was taken on the suggestion.

Respecting future work, it was decided (1) to investigate conflicts questions relative to agency in matters of contracts; (2) to have the Standing Committee work on elimination or simplification of authentification requirements for foreign public documents; (3) to consider possibilities of revision of the old Hague Conventions on Matters of Status and to undertake revision of the Convention of 1902 on Guardianship over Minors; (4) to consult on preparation of a conflicts convention respecting form requirements for last wills. The delegation of the United Kingdom had suggested the last-named topic.

The Conference was presided over by Professor J. Offerhaus, of The Netherlands. Messrs. Julliot de la Morandière, France, Frédéricq, Belgium, Hammes, Luxemburg, and Monaco, Italy, were the respective committee chairmen. Reporters were Messrs. van Hecke, on transfer of title, Batiffol, on contractual forum, de Winter and Jenard, on the support questions. The efficient Secretariat of the session was under the direction of Mr. M. H. van Hoogstraten, secretary general of the Hague Conference.

K. H. N.

UNITED NATIONS CONFERENCE ON MAINTENANCE OBLIGATIONS—The United Nations Conference on Maintenance Obligations met in New York from May 29 to June 20, 1956. Thirty-two Governments participated in the Conference: Afghanistan, Argentina, Austria, Belgium, Bolivia, Cambodia, Ceylon, China, Columbia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, France, Germany (Federal Republic), Greece, Iran, Israel, Italy, Japan, Korea, Mexico, Monaco, Netherlands, Norway, Philippines, Sweden, Uruguay, Vatican City, Yugoslavia. Nine Governments were represented by observers: Canada, Czechoslovakia, Guatemala, Lebanon, Peru, Switzerland, Turkey, United Kingdom, Venezuela.

The Draft Convention on the Recovery Abroad of Claims for Maintenance prepared by the Committee of Experts appointed by the Secretary General in 1952 (E.M. Meijers, H. E. Yntema, M. Matteucci, Mme Kraemer-Bach, K. Lipstein, E. A. Saleh, F. C. de San Tiago Dantas) was used as basis for the discussion. On June

20, 1956 the Conference adopted unanimously, and opened for signature, the Convention on the Recovery Abroad of Maintenance. The text of the Convention in 21 articles has been printed in 31 St. John's Law Review (1956) 40, in appendix to an article by Paolo Contini, Executive Secretary of the Conference. Early in December, 1956, twenty nations had signed the Convention.

VARIA

SALZBURG SEMINAR IN AMERICAN STUDIES—The fourth annual session of the Salzburg Seminar in American Studies devoted to American Legal Thought and Institutions was held at Schloss Leopoldskron from June 10 to July 7, 1956. The participants at the session numbered 55. They came from 15 countries, almost all "civil law" countries. They included judges, government officials, practicing lawyers, law teachers, and law students. The Faculty for the session was composed of: Prof. Charles L. Black, Jr., Columbia University, Prof. David F. Cavers, Associate Dean, Harvard Law School, Prof. Paul R. Hays, Columbia University, Prof. Louis B. Schwartz, University of Pennsylvania, and Justice Roger J. Traynor, of the Supreme Court of California. In addition to lectures on the Institutional Framework of American Law, seminars were offered on: Legal Protection of Civil Rights in the United States (Black); The Conflict of Laws in a Federal System (Cavers); American Law of Labor-Management Relations (Hays); Free Enterprise and Economic Organization (Schwartz); Major Concepts in the Common Law of Torts (Traynor).

CENTRE FRANÇAIS DE DROIT COMPARÉ—The new spacious building for the Centre Français de Droit Comparé and the Institut des Hautes Études de l'Amérique Latine at 28, rue Saint Guillaume, Paris, 7e, was officially opened on May 3, 1956. The Institute of Comparative Law of the Law School of the University of Paris has been moved to the new building.

MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT—The Max-Planck-Institut für ausländisches und internationales Privatrecht has moved from Tübingen to new quarters in Hamburg. The new building, Mittelweg 187, Hamburg 13, which houses the important foreign law library of 90,000 volumes, was officially opened on October 29, 1956.

COMPARATIVE LAW INSTITUTES IN ARGENTINA—Comparative law institutes have been opened, or reopened, at the Universities of Cordoba, Buenos Aires, and La Plata.

ASIAN LEGAL CONSULTATIVE COMMITTEE—The Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan, and Syria have agreed on the formation of a standing committee to be known as the Asian Legal Consultative Committee, consisting of members nominated by the Governments of each of the participating countries. The statutes of the Committee also provide for admission to membership of persons nominated by the Governments of other Asian countries which may hereafter decide to participate. The purposes of the Committee as set out in the statutes are:

(1) Examination of questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before that Commission;

(2) Consideration of legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to Governments as may be thought fit;

(3) Exchange of views and information on legal matters of common concern.

The Committee has been formed in pursuance of a decision taken at the closing session of the International Legal Conference held in New Delhi in January, 1954.